KIRCHWEY'S CASES

ON THE

LAW OF MORTGAGE

SECOND EDITION

BY

I. MAURICE WORMSER

PROFESSOR OF LAW, FORDHAM UNIVERSITY LAW SCHOOL
AUTHOR OF CASEBOOKS ON CORPORATIONS,
CONTRACTS, ETC.

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SELECT CASES ON THE LAW OF MORTGAGE

BOOK I

INTRODUCTION: PROPERTY SECURITY FOR DEBT

(a) *Pledge and Hypothecation*

LANGDELL, CLASSIFICATION OF RIGHTS AND WRONGS, 13 HARV. L. R. 539, 540. An obligation is either personal or real, according as the obligor is a person or a thing. . . .

A real obligation is undoubtedly a legal fiction, but it is a very useful one. It was invented by the Romans, from whom it has been inherited by the nations of modern Europe. That it would ever have been invented by the latter is very unlikely, partly because they have needed it less than did the ancients, and partly because they have not, like the ancients, the habit of personifying inanimate things. The invention was used by the Romans for the accomplishment of several important legal objects, some of which no longer exist, but others still remain in full force. It was by means of this that one person acquired rights in things belonging to others (*jura in rebus alienis*). Such rights were called *servitutes* (*i. e.*, states of slavery) in respect to the thing upon which the obligation was imposed, and they included every right which one could have in a thing, short of owning it. These servitudes were divided into real and personal servitudes, being called real when the obligee as well as the obligor, *i. e.*, the master (*dominus*) as well as the slave (*servus*), was a thing, and personal when the obligee was a person. The former, which may be termed servitudes proper, have passed into our law under the names of easements and profits *à prendre*. The latter included the *pignus* and the *hypotheca*, *i. e.*, the Roman mortgage—which was called *pignus* when the thing mortgaged was delivered to the creditor, and *hypotheca* when it was constituted by a mere agreement, the thing mortgaged remaining in the possession of its owner. Originally, possession by the creditor of the thing mortgaged was indispen-

sable, and so the *pignus* alone existed; but, at a later period, the parties to the transaction were permitted to choose between a *pignus* and a *hypotheca*. So long as the *pignus* was alone in use, it is obvious that the obligation could be created only by the act of the parties, as they alone could change the possession of the property. But when the step had been taken of permitting the mere agreement of the parties to be substituted for a change of possession, it was another easy step for the law, whenever it saw fit, to substitute its own will for the agreement of the parties; and hence hypothecations came to be divisible into such as were created by the acts of the parties (conventional hypothecations), and such as were created by the act of the law (legal or tacit hypothecations). Again, so long as a change of possession was indispensable, it is plain that the obligation could attach only upon property which was perfectly identified, and that there could be no change in the property subject to the obligation, except by a new change of possession. But when a change of possession had been dispensed with, and particularly when legal or tacit hypothecations had been introduced, it became perfectly feasible to make the obligation attach upon all property, or all property of a certain description, either then belonging to the debtor or afterward acquired by him, or upon all property, or all property of a certain description, belonging to the debtor for the time being; and hence hypothecations came to be divided into those which were special and those which were general.

The *pignus* has passed into our law under the name of pawn, or pledge, as to things movable, but has been wholly rejected as to land. The conventional *hypotheca* has been wholly rejected by our common law, though it has passed into our admiralty law. The legal or tacit hypothecation, on the other hand, has been admitted into our common law to some extent, though under the name of lien (a word which has the same meaning and the same derivation as "obligation"). Thus, by the early statute of 13 E. I., c. 18, a judgment and a recognizance (the latter being an acknowledgment of a debt in a court of record, of which acknowledgment a record is made) are a general lien on all the land of the judgment debtor and recognizor respectively, whether then owned by them or afterwards acquired. So also, in many cases, the law gives to a creditor a similar lien on the debtor's movable property, already in the creditor's possession when the debt accrues, though, in respect to the creditor's possession, this lien has the features of a *pignus* rather than of a *hypotheca*.

In that case if he tender the hundred pounds to him according to the condition, and he refuseth it, B. hath no remedy therefor, and so is our author in this and his other cases of like nature to be understood.

LIT. § 339. Also, if the feoffee in morgage before the day of payment which should be made to him, makes his executors and die, and his heir entereth into the land as he ought, &c., it seemeth in this case that the feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee, because the money at the beginning trenched to the feoffee in manner as a duty, and shall be intended that the estate was made by reason of the lending of the money by the feoffee, or for some other duty; and, therefore, the payment shall not be made to the heir, as it seemeth, but the words of the condition may be such, as the payment shall be made to the heir. As if the condition were, that if the feoffor pay to the feoffee or to his heirs such a sum at such a day, &c., there after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heir at day appointed, &c.

2 BLACKSTONE, COM. 157. There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are:—

Estates held *in vadio*, in *gage*, or pledge, which are of two kinds, *vivum vadium*, or living pledge, and *mortuum vadium*, dead pledge, or *mortgage*.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose £200) of another, and grants him an estate, as of £20 *per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living: it subsists, and survives the debt; and immediately on the discharge of that, results back to the borrower. But *mortuum vadium*, a dead pledge or *mortgage* (which is much more common than the other), is where a man borrows of another a specific sum (*e. g.*, £200) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of £200 on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor. In this case, the land, which is so put in pledge,

is by law, in case of non-payment at the time limited, forever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute.[1] But, so long as it continues conditional, that is, between the time of lending the money and time allotted for payment, the mortgagee is called tenant in mortgage. But as it was formerly a doubt, whether, by taking such estate in fee, it did not become liable to the wife's dower and other incumbrances of the mortgagee (though that doubt has been long ago overruled by our courts of equity), it, therefore, became usual to grant only a long term of years by way of mortgage, with condition to be void on repayment of the mortgage money, which course has been since pretty generally continued principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, whatever nature the mortgage may happen to be.

As soon as the estate is created, the mortgagee may immediately enter upon the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage money at the day limited. And, therefore, the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterward evicted by the mortgagor, to whom the land is now forever dead. But here again the courts of equity interpose, and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest and expenses; for otherwise, in strictness of law, an estate worth £1000 might be forfeited for non-payment of £100, or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption;* and this enables a mortgagor to call on the mortgagee who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium.* But on the other hand, the mortgagee may either compel the sale of the estate in order to get the whole of his money immediately, or else call upon the mort-

[1] But see, Coote on Mortgage, 5, 9.

Upon this authority it is said that the mortgagee has no legal estate in the land; that all mortgages are personal estate; and if the land is not redeemed nor redeemable, the judge of probate has a right to assign to the widow, where there are children, a third, and where there are none, half the land, to hold, not during life, but forever, in fee. . . .

In order the better to settle the authority of these propositions, said to have fallen from Lord Mansfield, it may not be amiss, first to consider the third proposition, viz.: "that the estate in the land is the same thing as the money due upon it;" as it may serve to illustrate the rest, and show what is intended to be implied in some or all of them.

If the mortgagee's estate in the land is the same thing as the money due upon it, then the money due upon the land is the mortgagee's estate in it; and consequently there is no difference between the mortgage of land for a term only, and a mortgage of it in fee, if it be for the same sum; the money, which is the estate in the land, being exactly the same in both cases; and the mortgagee in fee has no other nor greater estate in the land than the mortgagee of a term only hath. This proposition, if true, when taken according to the words of it, without restriction or limitation, at once destroys the distinction between the *vadium vivum* and the *vadium mortuum*. It renders idle the invention and substitution of mortgages for a term instead of mortgages in fee, and tends to prove that the mortgagee has no estate, according to the legal sense of words, in the land. But surely Lord Mansfield did not so understand the proposition; for in that which immediately precedes it, he plainly distinguishes between the money and the estate in the land, and so he doth in those which follow. In the same case he just before says, that if it appeared that the testator really meant and intended to devise the close as land, it would be a devise of the land, the mortgage being forfeited by law, and the estate in the land having become absolute. What, was the money become absolute? No, surely. His lordship meant, that the conditional fee simple which the mortgagee had in the close by the non-payment of the money by the day, had become an absolute fee simple in law; so that he might devise the land to his son and daughter in fee tail; and if that was his intent in the will, the close would pass accordingly, as an estate of inheritance in fee tail so long as it continued, which would be until it was redeemed, or the estate tail was spent, agreeably to what Lord Keeper Wright said in Gilb. Eq. Ca. 3, in the case of a mortgage in fee.

The money due on the mortgage could not, by Lord Mansfield, be considered as the estate in the land, so as to make the money real estate, nor the estate in the land money, so as to make an estate in fee in land or the land itself personal estate. His lordship doubtless well knew there was a difference between a mortgage of land for a term only and a mortgage in fee: That the former was but a chattel and the latter an estate of inheritance; that the former, unless dependent upon the inheritance, was *legal* assets, and the latter *equitable* assets only; that the former went directly to the executor, &c., but the latter descended to the heir, and the executor could not have the land without the aid of the Court of Chancery. And yet the several propositions, as they stand, confound mortgages for a term and mortgages in fee together; as though there was no difference between them, which is not reasonable to suppose Lord Mansfield ever did; and, therefore, it must be supposed the reporter did not take down the restrictions, with which his lordship qualified his propositions, and left them to be implied by the reader. . . .

For if the mortgagor in fee shall, after the day of payment is elapsed, pay the mortgage money to the mortgagee, it doth not revest the fee in him in law, nor even in equity; because the mortgagee is deemed in such a case by the Court of Chancery a trustee of the mortgagor, &c., until the estate is reconveyed; and so is a vendor after a contract to convey, and the land, though not conveyed, will in equity pass by the will of the vendee as his land (3 Chan. Rep. 3). And surely, forgiving the debt will not vest the estate in the mortgagor, more than payment of the mortgage money. Nay, where mortgages are devised to executors, upon payment of the money to them, the heir is decreed to join in the reconveyance. . . .

Upon the whole the futility of the allegations, "that mortgages are personal estate, that a mortgagee has no estate in the land, and that the land mortgaged, even after it has become irredeemable, may be distributed by the judge of probate as personal estate," is evident. . . .

Authorities showing the estate, both legal and equitable, to be in the mortgagee: 2 Atk. 352–4; 2 Cha. Ca. 97; 1 Cha. Ca. 285.[1]

[1] "If the estate on which a pauper resides is substantially his property, that is sufficient whatever forms of conveyance there may be; and therefore a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common-sense to say the mortgagor is not the real owner. . . ." —*Per* Lord Mansfield, in *The King* v. *St. Michaels*, Doug. 632 (1781).

BOOK II

ESSENTIAL ELEMENTS OF MORTGAGE

CHAPTER I

CONVEYANCE

SECTION I.—MORTGAGE, PLEDGE AND LIEN

FRANKLIN *v.* NEATE

COURT OF EXCHEQUER, 1844

(13 *M. & W.* 481)

This was an action of trover for a chronometer; to which the defendant pleaded, first, not guilty; secondly, that the plaintiff was not possessed of the chattel.

At the trial, before *Parke, B.*, at the Middlesex sittings in last Trinity Term, it appeared that the chronometer for which the action was brought had been pledged, by a person named Gilbert, to the defendant, a pawnbroker, under a written agreement that it was deposited as a collateral security for the sum of £15, and interest; and that, in case Gilbert should not redeem it before twelve months, the defendant should be authorized to sell it, and repay himself principal and interest. The plaintiff afterward bought the chronometer from Gilbert, whilst it was in the defendant's hands, after the expiration of the year; he then tendered to the defendant the amount due, and demanded possession of it, and on the defendant's refusing to deliver it, brought the present action. It was contended for the defendant, that no property passed to the plaintiff by the sale; that it was merely an assignment of a right of action, with an equity of redemption; and the learned Judge, being of that opinion, directed the jury to find their verdict in favor of the defendant; giving leave to the plaintiff to move to enter a verdict for him for the sum of £19 10s.

ROLFE, B. This was an action of trover for a chronometer. It appeared on the trial that the chronometer in question had been

pawned by the owner with the defendant, and at the time of the pawn, the owner delivered to the defendant a written paper, authorizing him to sell if the chronometer was not redeemed within a year. The owner afterward sold it to the plaintiff, subject to the defendant's right as pawnee. The plaintiff, then, after the year had expired, tendered to the defendant the amount due on the pawn, but the defendant denied the plaintiff's right to redeem, and refused to deliver up the chronometer, and, therefore, the plaintiff brought this action. On this state of facts, the verdict on the issue on the plea denying the plaintiff's possession, was by the direction of my brother Parke, who tried the cause, taken for the defendant, with liberty, nevertheless, for the plaintiff to move to enter a verdict for him, with £19 10*s*. damages, in case the Court should be of opinion that he had proved the issue. The learned Judge was inclined to think that this was not the case of a simple pawn, but that the terms on which the chronometer was pledged were such as to give the defendant something more than the right of a pawnee, and operated as a mortgage. If he was a mortgagee, and the absolute property was transferred to him, defeasible upon repayment of the money advanced, the assignee of the right of redemption, which only remained in the original owner, could have maintained no action of trover after tendering the money; but, considering the terms of the instrument which accompanied the deposit, we all agree in thinking, that, though they gave more than the ordinary right of a pawnee, viz., the right to sell, which, being part of the security for the advance, was irrevocable by the pledgor or his assignee, they did not constitute a mortgage or transfer of the entire legal property in the chattel itself. The case, therefore, stands on the same footing, as far as relates to the right of the pawnor, with an ordinary pledge.

A rule *nisi* having been granted, pursuant to the leave reserved, Mr. Petersdorff, for the defendant, showed cause, and contended that the verdict was right, on the ground that a pawnor cannot transfer to another such a right of possession as enables him to bring an action of trover. There is very little to be found in the books on the subject of the right of a pawnor over the chattel pawned; but this is very clear, that, notwithstanding the pawn, the pawnor still retains a qualified property; and, in the absence of direct authority on the point, this seems to us decisive in favor of his right to sell, and by the sale to transfer to the purchaser his qualified property in the goods pawned, together with all the rights incident thereto. The case was argued for the defendant, as if

Atlantic Insurance Company to recover against the defendant, John Conard, the Marshal of that district, the value of certain teas shipped on board the ships Addison and Superior, and levied upon by him, upon an execution in favor of the United States against one Edward Thompson, as the property of the latter. . . . The cargoes had previously been transferred by Thompson to the Insurance Co. by assignment of the bills of lading to secure the payment of a *respondentia* bond. It was held that this constituted a mortgage. The defendant contended that the statutory priority of the United States (Stat. 1799, c. 128, § 65) extended to this case. The Supreme Court overruled the claim in an opinion by Mr. Justice Story, from which the following is taken (440):

"Then, again, it is contended on behalf of the United States, that the priority thus created by law, if it be not of itself a lien, is yet superior to any lien, and even to an actual mortgage, on the personal property of the debtor."

It is admitted that where any absolute conveyance is made, the property passes so as to defeat the priority; but it is said that a lien has been decided to have no such effect, and that in the eye of a Court of Equity a mortgage is but a lien for a debt. *Thelluson* v. *Smith*, 2 Wheat. 396, has been mainly relied on in support of this doctrine. That case has been greatly misunderstood at the bar, and will require a particular explanation. But the language of the learned Judge who delivered the opinion of the Court in that case is conclusive on the point of a mortgage. "The United States," said he, "are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt; or if his property has been seized under a *fieri facias*, the property is divested out of the debtor and cannot be made liable to the United States." The same doctrine may be deduced from the case of the *United States* v. *Fisher*, 2 Cranch, 358, where the Court declared that "no *bona fide* transfer of property in the ordinary course of business is overreached by the statutes," and "that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee." If so plain a proposition required any authority to support it, it is clearly maintained in *United States* v. *Hooe*, 3 Cranch, 73.

It is true, that in discussions in Courts of Equity, a mortgage is sometimes called a lien for debt. And so it certainly is, and something more; it is a transfer of the property itself, as security for

the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible.[1]

Ex parte FOSTER, 2 Story, 131, 142 (1842). "But it is said that an attachment under our law constitutes a lien upon the property attached; that it is a perfect, fixed and vested lien, as much so as a lien by a mortgage upon personal estate; that it gives a vested interest in the real estate attached, so that the creditor may dispute the validity of a will thereof, and that it is deemed equivalent to a title by purchase for a valuable consideration. And certain authorities are relied on to establish and confirm these positions. . . .

"It is true, as asserted at the bar, that an attachment upon mesne process is constantly spoken of in our Reports as a lien, and doubtless it is so in a very general sense of the term, adopted by way of analogy and illustration, rather than from a very exact resemblance which it bears to liens, generally recognized as such at the common law, or in equity, or in maritime jurisprudence. But, as has been truly said by Lord Coke, no simile holds in everything. *Nullum simile quatuor pedibus currit.* Lord Tenterden has said that the word lien, in its proper sense, in the law of England, imports that the party is in possession of the thing that he claims to detain, and that where there is no possession, actual or constructive, there can be no lien. And this is generally true, perhaps universally true at the common law, independently of statutory provisions, or of special contract. The doctrine was explicitly asserted by Mr. Justice Buller in delivering his opinion in the great case of *Lickbarrow* v. *Mason*, before the House of Lords (6 East. R. 21, note; *id.* 25), where he says: 'Liens exist at law only in cases where the party entitled to them has the possession of the goods, and if he once part with the possession after the lien attaches, the lien is gone.' . . .

"In equity, also, liens exist independent of possession, either

[1] Later cases seem to declare that a lien also will not be overriden. *The Thomas Scattergood*, Fed. Cas. No. 11,106 (1828).

contracts to sell it to a purchaser, but dies before the contract is performed, the will is revoked as to the beneficial or equitable interest in the estate, for the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser dies intestate before performance of the contract, the equitable estate descends to his heir at law, who may require the personal representative to pay the purchase money. But all this depends on the contract being such as a Court of equity would decree to be specifically performed.

There can be no doubt, therefore, that if the mortgage deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, the mortgagor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed.

But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

Apply these familiar principles to the present case; it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the meantime, was a trustee of the property in question.

There is another criterion to prove that the mortgagee acquired an estate or interest in the added machinery as soon as it was brought into the mill. If afterwards the mortgagor had attempted to remove any part of such machinery, except for the purpose of substitution, the mortgagee would have been entitled to an injunction to restrain such removal, and that because of his estate in the specific property. The result is, that the title of the appellants is to be preferred to that of the judgment creditor. . . .

I therefore advise your Lordships to reverse the order of Lord Chancellor Campbell, and direct the petition of rehearing presented to him to be dismissed, with costs.

Lord Chelmsford. The question in the case is, whether the appellants, who have an equitable title as mortgagees of certain machinery fixed and placed in a mill, of which the mortgagor, James Taylor, was tenant, are entitled to the property which was seized by the sheriff, under two writs of execution issued against the mortgagor, in priority to those executions, or either of them?

The title of the appellants depends upon a deed dated the 20th September, 1858. [His Lordship here stated the bill of sale and the other facts of the case—see *ante*.] The machinery sold by the sheriff was more than sufficient to satisfy the first execution, and the appellants claiming a preference over both executions, contend that the possession taken by them on the 30th April entitled them, at all events, to priority over the second execution of the 11th May. The great question, however, is, whether they are entitled to a preference over the first execution by the mere effect of their deed? or whether it was necessary that some act should have been done after the new machinery was fixed or placed in the mill, in order to complete the title of the appellants?

It was admitted that the right of the judgment creditor, who has no specific lien, but only a general security over his debtor's property, must be subject to all the equities which attach upon whatever property is taken under his execution. But it was said (and truly said) that those equities must be complete, and not in-

must take the property, subject to every liability under which the debtor held it.

The present case, however, meets any possible difficulty upon the subject of notice, because it appears that the deed was registered as a bill of sale, under the provisions of the 17 & 18 Vict., c. 36. It was argued that this Act was intended to apply to bills of sale of actual existing property only, and it probably may be the case that sales of future property were not within the contemplation of the Legislature; but there is no ground for excluding them from the provisions of the Act; and upon the question of notice, the register would furnish the same information of the dealing with future as with existing property, which is all that is required to answer the objection.

I think that the late Lord Chancellor was right in holding that if actual possession of the machinery in question before the sheriff's officer entered was necessary, there was no proof of such possession having been taken on behalf of the mortgagee. But upon a careful consideration of the whole case, I am compelled to differ with him upon the ground on which he ultimately reversed Vice-Chancellor Stuart's decree. I think, therefore, that his decree should be reversed, and that of the Vice-Chancellor affirmed.[1]

[1] In *Tailby* v. *Official Receiver*, L. R. 13 A. C. 523 (1888), a manufacturer made an assignment for valuable consideration of all his stock in trade, fixtures, furniture and machinery in or about certain designated premises or any other place or places at which during the continuance of the security he might carry on business, "and also all book debts due and owing or which during the continuance of this security become due and owing to the said mortgagor." The objection was urged that an assignment of future book debts not limited to any specific business was too vague to have any effect since it was without any delimitation as to time, place or amount. The House of Lords *held* that this objection should be overruled, declaring that an individual may contract to assign all his future book account and that this is neither too vague nor indefinite, citing the principal case.

See, also, *Illingworth* v. *Houldsworth* [1904], A. C. 355.

In *Ferguson* v. *Wilson*, 122 Mich. 97, 80 N. W. 1006 (1899), a chattel mortgage was given on certain designated property which also provided that it should cover "all other personal property which I may own or acquire during said years." The objection was urged that this clause would not embrace property afterwards acquired having no connection with the property owned by the mortgagor at the time of the giving of the mortgage. The court sustained this objection holding that, whatever might be the rule as between the parties themselves, the mortgage did not create a valid lien upon after-acquired property not connected with

MOODY *v.* WRIGHT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1847

(13 *Metcalf*, 17)

This was a petition, under St. 1838, c. 163, § 18, for the interposition of the Court, as a court of chancery, in behalf of a creditor of two insolvent partners. The petitioner alleged that Horace Wright and Benjamin B. Hoxse, tanners, and partners in business, applied to the Judge of Probate for the County of Hampshire, in December, 1846, for the benefit of the insolvent laws, and that such proceedings were had, upon their application, that all their estate was assigned to the defendant, as assignee: That the petitioner, in July, 1839, sold and delivered to said Wright & Hoxse, hides, skins and bark, for the sum of $2374.34, on credit, and took their promissory note therefor, payable in four months, with annual interest, and also took a mortgage of said property, and of other property, which mortgage was duly recorded, and by which they secured to the plaintiff whatever hides, skins, bark or stock, which might afterwards belong to them, wherever situated, and whether manufactured or not, and whether at market or not, or the proceeds of the same, if sold, and also all leather thereafter manufactured from the proceeds of the property then on hand, and in whatever shape it might afterwards exist, or whatever form it might assume, so that the then present and future earnings of the said Wright & Hoxse's tan works, both stock and proceeds, and whether sold or unsold, might stand conveyed, pledged and hypothecated to the petitioner, for the payment of said purchase money and note: That said note and mortgage had never been satisfied, discharged or cancelled, and that their validity had been repeatedly recognized and confirmed by said Wright & Hoxse, by the payment, and indorsement on the note, of the annual interest thereby secured: That the petitioner, at the first meeting of the creditors of said Wright & Hoxse, presented a petition to said judge of probate, setting forth the facts above mentioned, and also stating that the property intended to be secured by the mortgage aforesaid had been taken by the messenger, under the warrant issued according to the provisions of the insolvent laws, and praying that said property might be sold, and the proceeds thereof applied

the business in which the mortgagor was engaged at the time of giving the mortgage, as against subsequent good-faith purchasers or attaching creditors.

because the custody of the same was not taken and retained by the pledgee. The property cannot be held as charged with a lien, because a lien cannot be created by an executory agreement without being accompanied by possession or delivery of the property. A stipulation that future acquired property shall be holden as security for some present engagement, is an executory agreement, of such a character, that the creditor with whom it is made may, under it, take the property into his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act is done by him, he has no title to the same; and that, such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such a case, is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good. If, however, before taking possession, or doing such acts as are necessary to give vitality to the mortgage, as to the subsequently acquired property, an attachment or assignment for the benefit of creditors takes place, the opportunity for completing the lien is lost, and the mortgage or pledge not being perfected, the property passes to the assignee, and must be held by him for the benefit of the creditors generally.

There was no act done by the petitioner and by Wright & Hoxse jointly, or by either of the parties, which was sufficient to give effect to the original mortgage, as to the after acquired property. The recording of the mortgage by the petitioner did not; for that was before such property was acquired. The annual payment of interest by Wright & Hoxse could have no such effect. It was neither actually nor symbolically accepting the transfer or conveyance of the articles after they were acquired by Wright & Hoxse.

In no way, that we perceive, can we give effect to this contract, so as to give the petitioner the lien, upon the after acquired property, that he seeks to establish.

Petition dismissed with costs.[1]

[1] Followed, *Low* v. *Pew*, 108 Mass. 347 (1871); *Chynoweth* v. *Tenney*, 10 Wis. 397 (1860). But see *Chase* v. *Denny*, 130 Mass. 566 (1881). In *Federal Trust Company* v. *Bristol County Street Railway Co.*, 222 Mass.

SMITHURST *v.* EDMUNDS

COURT OF CHANCERY OF NEW JERSEY, 1862

(14 *N. J. Eq.* 408)

THE CHANCELLOR. The complainant, being the owner of the Columbia House hotel, at Cape Island, with its appurtenances, and of the furniture therein, and being in possession of the premises, by an indenture bearing date on the seventh of June, 1860, leased the real estate to James H. Laird, for the term of three years from the first of May, 1860, at the yearly rental of $5000, payable in equal installments, on the fifteenth day of July and thirty-first day of August in each year, and sold and transferred to the lessee, the furniture and other household articles for the sum of $5563.42. Laird, as the lessee, as a collateral security for the punctual payment of the rent, resold and retransferred to the lessor all of said

35 (1915), RUGG, C. J., said at pp. 45–46:

"As an abstract proposition, the ruling that the mortgage as supplemented did not cover personal property acquired after the date of the supplemental indenture in August, 1901, was correct. The mortgagee did not take possession of any of this property by virtue of the power conferred by the mortgage. By no written instrument executed subsequent to its purchase was it brought under the lien of the mortgage. Under the general principle of law well established in this Commonwealth such after acquired personal property did not become subject to the mortgage either at law, *Jones* v. *Richardson*, 10 Met. 481; *Low* v. *Pew*, 108 Mass. 347, or in equity, *Moody* v. *Wright*, 13 Met. 17; *Blanchard* v. *Cooke*, 144 Mass. 207; *Wasserman* v. *McDonnell*, 190 Mass. 326; *Schlatter* v. *Young*, 197 Mass. 36; *Harriman* v. *Woburn Electric Light Co.*, 163 Mass. 85. Doubtless the general rule in equity elsewhere is contrary to our own. See *Central Trust Co.* v. *Kneeland*, 138 U. S. 414, 419; *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, 15; *Augusta Trust Co.* v. *Federal Trust Co.*, 82 C. C. A. 309, 312; *People's Trust Co.* v. *Schenck*, 195 N. Y. 398. Whatever may be the rule in other jurisdictions, the law is too firmly settled in this Commonwealth to be uprooted by judicial decision."

In *Humphrey* v. *Tatman*, 198 U. S. 91 (1904), *held*, taking possession of after acquired property within four months of the filing of petition in bankruptcy, under a mortgage made in good faith prior to that period, is valid against the trustee in bankruptcy according to the law of Massachusetts,—the court deciding that the time of the intervening act was immaterial, provided that the original mortgage was given before the four months preceding the bankruptcy. This decision reversed the Supreme Judicial Court of Massachusetts, 184 Mass. 361 (1903). And see *Thompson* v. *Fairbanks*, 196 U. S. 516 (1904).

both in England and this country, as applicable to sales as well as to mortgages.

The suggestion of Chief Justice Tindall, that the grant might be so framed as to give the grantee a right between themselves to seize after-acquired goods of the grantor, was acted upon in *Congreve* v. *Evetts*, 10 Exch. 298; *Hope* v. *Hayley*, 5 Ellis & B. 830, and in other cases cited below, but the doctrine held in the principal case has not been shaken; on the contrary, it is in a mass of cases declared to be settled, if not elementary law (*Gale* v. *Burnell*, 7 Q. B. 850; *Chidell* v. *Galsworthy*, 6 C. B. [N. S.] 471; *Jones* v. *Richardson*, 10 Metc. 481; *Barnard* v. *Eaton*, 2 Cush. 294; *Rice* v. *Stone*, 1 Allen, 566; *Low* v. *Pew*, 108 Mass. 347; *Van Hoozer* v. *Cory*, 34 Barb. 9; and many other cases cited in Benjamin on Sales, § 79, note *k*).

That this is the rule at law, is regarded by Chancellor Green in *Smithurst* v. *Edmunds*, 1 McCarter, 408, as beyond controversy. He says that to constitute a valid legal sale, the vendor must have a present property, either actual or potential, in the thing sold.

The judgment of the Court below in favor of the defendant was right, and should be affirmed.

BRETT *v.* CARTER

DISTRICT COURT OF THE UNITED STATES, MASSACHUSETTS DISTRICT, 1875

(2 *Lowell*, 458)

Bill in equity by the assignee in bankruptcy of one Osborne N. Sargent, against a mortgagee of the stock of stationery and other similar goods. It appeared that Sargent bought out the stock in trade of the defendant Carter, as carried on by him at a certain place, in November, 1874, and on the same day he gave back a mortgage to secure the payment of the purchase money by installments, represented by promissory notes extending over a period of four years. The mortgage conveyed the stock "and any other goods which may from time to time, during the existence of this mortgage, be purchased by the grantor and put into said store to replace any part of said stock which may have been disposed of." Among the covenants was one, that, if the stock should be diminished "faster than said sum hereby secured is paid, said grantor is to furnish further security for said sum, whenever required by said grantee."

Two of the notes were duly paid, but one that came due in November, 1875, was not paid in full, and the defendant demanded further security, and a mortgage was given of such stock as had been acquired during the year. This mortgage was given about two weeks before the petition in bankruptcy was filed, and the theory of the bill was that it was a preference. The complainants afterwards asked leave to amend, and allege the first mortgage to be void, on the ground that the mortgagor was tacitly permitted to sell the goods in the ordinary course of his trade.

The defendant insisted that both mortgages were valid.

Lowell, J. The Court of Appeals of New York decided, by a bench which was equally divided in opinion, that a mortgage of chattels which permits the mortgagor to continue in possession and to sell the goods in the ordinary course of business, is void on its face, as mere matter of law (*Griswold* v. *Sheldon*, 4 Comstock, 581). This decision has had a remarkable following, and its doctrine appears to have become the settled law of New York,[1] Ohio and Illinois. It is not the law of England, Maine, Massachusetts, Michigan, or Iowa. In several States it has not been passed upon. But as this new doctrine, or, rather, revival of an old one, has been said by Mr. Justice Davis, of the Supreme Court, to be so general and just that it may be presumed to be the law of Indiana, in the absence of express and unambiguous decisions of the courts of that State to the contrary, and as I venture to doubt both the generality and the justice of the doctrine, it becomes me, with all the respect I feel for that opinion, to state my reasons for not acceding to it. If the rule, whichever way it may be, were a settled rule of property in Massachusetts, inquiry into its history or justice would be unnecessary; but although I have no doubt my decision will accord with the law of Massachusetts, I have not found a case in this State in which the decisions in New York were reviewed, and it is possibly still a question for discussion.

I had supposed it to be well settled, after much debate and conflict of opinion, certainly, but substantially settled, that when a vendor or mortgagor was permitted to retain the possession and control of his goods and act as apparent owner, the question whether this was a fraud or not was one of fact for the jury, excepting under a peculiar clause of the bankrupt law of England. It is so pronounced by Mr. May, in his valuable treatise on *Voluntary*

[1] See *Zartman* v. *First National Bank*, *infra*. *Cf. Conkling* v. *Shelley*, 28 N. Y. 360 (1863).

Murdock v. *Gifford*, 18 *id.* 28; *Hoyle* v. *P. & M. R. R. Co.*, 54 *id.* 314, 324; *McRea* v. *C. N. Bank*, 66 *id.* 489–495).

In October, 1880, Argue assigned his interest in the lease to Albert Garrett and Adam Prentice. Thereafter Adam Prentice, to secure the payment of $950.50, executed and delivered to the plaintiff a mortgage on his undivided interest in the lease and upon all "his interest in the oil wells now thereon and to be by him placed thereon, with all his interest in the structures, fixtures, equipments and appurtenances now on said lease or hereafter to be placed thereon." On the 10th of January, 1881, a copy of the mortgage was filed in the Town Clerk's office, and thereafter it was duly refiled. Subsequently, and on the 24th day of August, 1882, Garrett and Prentice sold and assigned all their rights and interests under the lease to the defendants Alford and Curtis, who thereafter finished one well, put down two others, and added largely to the plant by way of engines, boilers and other machinery.

And the substantial question presented by this appeal is, whether the tubings, casings, engines, boilers, shafting and other machinery purchased and placed upon the property after the giving of the mortgage are embraced within it. True, the appellant contends that his title to the chattels is not burdened with the plaintiff's mortgage, because, as he alleges, Alford and Curtis purchased in good faith and without notice; but this claim is not well founded, for while a search, which failed to disclose the existence of a mortgage, was timely made in the Town Clerk's office, the referee has found upon sufficient evidence to support it, that the mortgage was filed as a chattel mortgage in the proper Town Clerk's office, and within thirty days of the expiration of the year thereafter it was refiled with the statement required by statute. Alford and Curtis are, therefore, chargeable with constructive notice, and the lien of the plaintiff is not affected by their failure to find the mortgage.

In some jurisdictions validity is denied to a contract in so far as it purports to embrace property to be acquired after date. The reason assigned for this holding is tersely stated in Perkins (sec. 65): "It is a common learning in the law that a man cannot grant or charge that which he hath not." In others it is held to be invalid in law and yet operative in equity. Unexplained, this seems to be a solecism, and results from a use of language which fails to accurately convey the idea intended. Invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of

equity, in giving effect to such a provision, does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does in law. But it construes the instrument as operating by way of present contract to give a lien, which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party. Such we deem the rule to be in equity in this State (*McCaffrey* v. *Woodin*, 65 N. Y. 459; *Wisner* v. *Ocumpaugh*, 71 *id.* 113; *Coats* v. *Donnell*, 94 *id.* 168–177).

As between the mortgagor, or his assignee, and the mortgagee, therefore, the chattel mortgage operated to create a lien in equity as to the chattels purchased and placed upon the property by the mortgagor subsequent to its date. This lien the trial court rightly enforced by its judgment. But it went further and declared, in effect, that the lien attached to the personalty placed upon the property by the assignees of the mortgagor as well. This, we think, was error. The assignees did not contract that the machinery to be placed upon the property by them should be subject to the provisions of the mortgage. They did not assume or agree to pay the mortgage or carry out its provisions. Indeed, the assignment contained no condition or covenant whatsoever, and the assignees did not even know of the existence of the mortgage. Their acceptance of the lease bound them to fulfill the covenants running with the land (113 Penn. St. 83; *Spencer's Case*, 1 Smith's L. C. 145). But it did not, in addition, burden them with the obligation to make good the personal covenants given by the lessee to third parties as security for an indebtedness, because they had constructive notice of the existence of the mortgage the lien of plaintiff can be enforced, and the defendants deprived of the machinery on the premises at the time of the purchase by them of the lease. But the lien provided for by the instrument could in any event only extend to property thereafter acquired by the mortgagor. It could not attach to chattels to which the mortgagor has not acquired either title or possession. Indeed, it does not, by its terms, purport to embrace any other after-acquired property than that placed thereon by the mortgagor.

It follows, from the views expressed, that the judgment should be reversed and a new trial granted, with costs of this court to the appellant, unless, within thirty days, the plaintiff stipulate to modify the judgment by excepting therefrom the articles placed on the property after the assignment to Alford and Curtis, and

to the plaintiffs' (the lessee's) action of trover. In the same case, Gray, C., observed that, if the relation of mortgagor and mortgagee had been created between the parties, "it was inoperative upon any property which at the time of its execution was not actually, or potentially, either possessed or owned by McCaffrey." In *Cressey* v. *Sabre*, 17 Hun, 120, where the opinion was delivered by Boardman, J., and was concurred in by Justices Learned and Bockes, a chattel mortgage upon potatoes (among other articles of property), which were not yet planted, was held inoperative. The distinction was there mentioned between a case like *McCaffrey* v. *Woodin*, where the question of title was between the parties to the contract and one where it arose between the mortgagee and a third person. In *Coats* v. *Donnell*, 94 N. Y. 168, Andrews, J., observed that "a contract for a lien on property not *in esse* may be effectual in equity to give a lien as between the parties, when the property comes into existence and where there are no intervening rights of creditors or third persons." *Kribbs* v. *Alford*, 120 N. Y. 519, recognizes the invalidity at law of a chattel mortgage of property thereafter to be acquired, but holds that as between the parties their contract would be construed in equity as creating an equitable lien, which could be enforced.

The idea of a chattel mortgage is that of a conveyance of personal property to secure the debt of the mortgagor; which, being conditional at the time, becomes absolute if, at a fixed time, the property is not redeemed, and the statute makes it valid, as against creditors of the mortgagor, only when filed as directed. The statute provides for the filing as a substitute for "an immediate delivery," or "an actual and continued change of possession of the things mortgaged." Such provisions seem to me to exclude the idea of a chattel mortgage upon non-existent things; or that such an instrument could operate to defeat the lien of an attaching, or an execution creditor upon subsequently acquired property. Regarding the chattel mortgage in question as a mere executory agreement to give a lien when the property came into existence, some further act was necessary in order to make it an actual and effectual lien as against creditors. But there was no further act by the parties to the instrument to create such an actual lien and the levy of the execution upon the crops operated to transfer their possession from the owner to that of the sheriff. As against his possession the equities of the mortgagee are unavailing for any purpose. Between the two creditors it is a question of who had gained the legal right to have the crops in satisfaction of his claim

and the equitable right of the mortgagee to them, as against his debtor, was defeated by the seizure at the instance of the judgment creditor. We are satisfied as to the correctness of the conclusion reached by the General Term below, that there should have been a direction of a verdict for the plaintiff for the potatoes and beans, obtained from the planting done after the execution and delivery of the mortgage.

The order appealed from should be affirmed and, under the stipulation, judgment absolute should be ordered for the plaintiff, with costs in all the courts.[1]

All concur, except Earl, J., not voting.

Ordered accordingly.

ZARTMAN *v.* FIRST NATIONAL BANK

COURT OF APPEALS OF NEW YORK, 1907

(189 *N. Y.* 267)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 27, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at an Equity Term.

The object of this action was to determine the rights of the parties to a fund realized from a sale in bankruptcy of the property of the Waterloo Organ Company, a manufacturing corporation formerly carrying on the business of making and selling organs, pianos and other musical instruments in the village of Waterloo. All the property of the company, both real and personal, was sold in one parcel, free from liens, by order of the United States District Court, and the value of such chattels included therein as were acquired by the company after it had given a corporate mortgage to secure its bonds issued and negotiated in the usual way, was the sum of $15,480. The judgment directed in favor of the plaintiff consisted mainly of that sum and there is no controversy over any other item. Upon appeal to the Appellate Division the judgment was affirmed, one of the justices dissenting, and the defendant appealed to this court.

[1] *Butt* v. *Ellett*, 19 Wall. 544 (1873); *Wheeler* v. *Becker*, 68 Iowa, 723 (1886), *contra*. But see *Comstock* v. *Scales*, 7 Wis. 159 (1858), denying effect to a mortgage of a crop made after planting.

Chick v. *Nute*, 176 Mass. 57 (1900), *per* HOLMES, C. J., *accord*.

tion. (*Skilton* v. *Codington, supra; In re Werner*, 5 Dill. 119; *In re Garcewich*, 8 Am. Bank Rep. 149; U. S. Bankruptcy Act of 1898, § 70.) When the general creditors intervened through the plaintiff, the mortgagee was simply in possession with title to the property that was in existence when the mortgage was given, but with no title to the shifting stock subsequently acquired. As to that property, it had only the promise of the mortgagor, which equity could help out by treating as done what was agreed to be done, but which it will not help out to the injury of unsecured creditors. The rights of the defendant, incomplete when it took possession, are incomplete still, for they can be perfected only by the aid of equity, and equity refuses to help under the circumstances of this case.

The judgment awarding the proceeds of the after-acquired property to the plaintiff was, therefore, properly rendered, and the action of the courts below should be sustained.

The judgment appealed from should be affirmed, with costs.

CULLEN, CH. J., GRAY, EDWARD T. BARTLETT, HAIGHT and WERNER, JJ., concur; HISCOCK, J., not sitting.

Judgment affirmed.

TITUSVILLE IRON CO. *v.* CITY OF NEW YORK

COURT OF APPEALS OF NEW YORK, 1912

(207 *N. Y.* 203)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 8, 1911, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

CULLEN, CH. J. On January 27th, 1906, one Hillman entered into a contract with the defendant board of education to furnish and install a heating and ventilating apparatus in a public school. Subsequently the plaintiff sold and delivered to Hillman certain boilers, castings and other parts of a hearing apparatus which Hillman intended to use in the performance of his contract, but, so far as appears in the evidence, were not installed in the building, nor delivered to or accepted by the board of education. The plain-

tiff was never paid by Hillman for the property. In June following proceedings in involuntary bankruptcy were commenced against Hillman, and on the 18th of that month a receiver of his estate was appointed by the United States District Court. On July 9th Hillman was adjudicated a bankrupt. Meanwhile, on the 27th of June, the board of education declared Hillman's contract forfeited under the following provision contained therein:

"If the work to be done under this contract shall be abandoned by the contractor, or if this contract shall be assigned, or the work sublet by him, otherwise than is herein specified, or if the contractor shall at any time refuse or neglect to supply a sufficiency of workmen and materials of the proper skill and quality, or shall fail in any respect to prosecute the work required by this contract with promptness and diligence, or shall omit to fulfill any provision herein contained, or if at any time the superintendent of school buildings shall be of the opinion and shall so certify in writing to the committee on buildings, that the performance of the contract is unnecessarily or unreasonably delayed, or that the contract wilfully violating any of the conditions or covenants of this contract or specifications, or is executing the same in bad faith, or not in accordance with the terms thereof, or if the work be not fully completed within the time named in the contract for its completion, the committee on buildings shall notify the contractor to discontinue all work, or any part thereof, under this contract, by written notice, signed on behalf of said committee by its chairman or acting chairman, to be served upon the contractor either personally or by leaving said notice at his place of residence or business, or with his agent in charge of the work, or with an employé found on the work, and thereupon the contractor shall discontinue the work or such part thereof, and the Board of Education shall thereupon have the power to contract for the completion of the contract in the manner prescribed by law, or to place such and so many persons as it may deem advisable, by contract or otherwise, to work at and complete the work herein described, or such part thereof, and to use such materials as he may find upon the line of the work and to procure the material for the completion, so as to fully execute the same in every respect, and the cost and expense thereof at the reasonable market rates shall be a charge against the contractor, who shall pay the party of the first part the excess thereof, if any, over and above the unpaid balance of the amount to be paid under this contract; and the contractor shall have no claim or demand to such unpaid balance, or by reason of

the mortgages were given on the sale of property to the road for security of the purchase money.

The mortgage of June 26, 1852, conveyed all the right, title and interest of the railroad to the railroad iron imported in the ship General Berry, then belonging to the road, subject to the lien of the United States for duties, being about 591 tons, to secure a note for $10,000, dated April 26, 1852. . . .

The several mortgages under which the plaintiffs claim remain in whole or in part unsatisfied. All the property described in the mortgages made after August 20, 1850, was purchased by and came to the possession of the road subsequently to that date; and all the property named in the mortgages running to Pierce and Haven, with the exception of the iron, was paid for with money lent to the road by the parties named in those mortgages, as is stated therein. In all these mortgages it is stated that they were given for the security of the parties named in them respectively. All these mortgages were duly executed and recorded in Portsmouth, which was by law established as the place of business for the road. . . .

On the 13th of July, 1850, the Legislature of this State passed an act entitled "An act to aid the construction of the Portsmouth and Concord Railroad," authorizing the road to issue bonds to the amount of $350,000, payable, with interest, in not less than ten, nor more than twenty years; the act to take effect when the stockholders should accept and adopt it. . . .

On the 3d of August, 1850, the stockholders met, accepted the act, and authorized the directors to appoint trustees, make a mortgage, and issue bonds at their discretion. On the 20th of August, 1850, the directors made a mortgage to Robert Rice, William Plumer, Jr., and Josiah Minot, trustees for those who were or should become holders of the bonds, to secure payment of bonds to the amount of $350,000, issued the same day. The original trustees, by death and resignation, are now out of that office, and the defendants, James W. Emery, Thomas L. Tullock and Nathaniel White, are substituted by appointments made under the act and mortgage.

The mortgage deed to the trustees recites that the trustees had been appointed under the act to take and hold security on all the property of said company, and all its rights, franchises, powers and privileges, in mortgage and in trust, for the payment and security of whoever then or thereafter might become the lawful holders of said bonds, or any of them, and conveys to the trustees, in the

name of the Portsmouth and Concord Railroad, "the railroad of said corporation, together with all its rights, powers, franchises and privileges," in the towns in which it was laid out, "with all the lands, buildings and fixtures thereto belonging, or which might thereafter thereto belong, with all the rights, franchises, powers and privileges now belonging to and held, or which may hereafter belong to, or be held, by said corporation; together with the locomotive engines, passenger, baggage, dirt, freight and hand cars, and all the other personal property of said corporation, as the same now is in use by said corporation, or as the same may be hereafter changed and renewed by said corporation; to have and to hold the said railroad, franchises and estate aforesaid, whether real or personal, with all the privileges and appurtenances, legislative grants, powers, rights, and privileges, now or hereafter granted, thereto belonging," in trust for the bond-holders, and in mortgage for security of the bonds; and the trustees are empowered by the deed, on breach of the condition, to sell "the said railroad," and to make all necessary conveyances, "passing all the property, real, personal and mixed, rights, powers, franchises and privileges of this corporation," to the purchaser or purchasers.

On the same 20th of August the directors issued bonds to the amount of $350,000, from which the road realized $289,535, and no more. At that time the road owed about $158,700, and have since expended in constructing and furnishing the road at least $573,000, and of the debts then owing more than $100,000 have been paid.

The condition of the mortgage to the trustees having been broken, the present trustees, Emery, Tullock and White, at the request of certain bond-holders, according to the terms of the mortgage, on the 14th day of May, 1855, applied to the directors to surrender to them all the mortgaged premises; and the directors by deed of surrender, dated May 31, 1855, surrendered and transferred to them all the property, rights, powers, franchises and privileges named in the deed of mortgage, to hold according to the terms and conditions thereof. The trustees have taken possession of the road, and under their mortgage claim the property mortgaged to the complainants; and the property has been delivered into the hands of the trustees, under an agreement that it should be used in operating the road, and a compensation paid for it.

The stockholders have voted that it is inexpedient to redeem the road and its property from the mortgage to the trustees, and under the provisions of the mortgage the trustees will be bound

Wales R. W. Co., 14 Ad. & Ellis (N. S.), 902; *Clark* v. *Washington*, 12 Wheaton, 46, 54; *Winchester & Lexington Turnpike R. Co.* v. *Vimont*, 5 B. Monroe, 1; *Arthur* v. *The Commercial & R. R. Bank*, 9 S. & M. 394).

If this corporation had authority to make a mortgage that should convey the franchise and corporate rights, the power must be derived from the special act. It is a very familiar rule in the interpretation of statutes that all parts of the act must be considered together, and such construction given to it as will best answer the intention of the makers. To accomplish this object, in some cases the letter of the statute may be restrained by an equitable construction; in others, enlarged; and sometimes the construction may be even contrary to the letter (*Holbrook* v. *Holbrook*, 1 Pick. 250; *Somerset* v. *Dighton*, 12 Mass. 384). On examination of this act it will at once be seen that the several parts cannot all take effect in the sense that would most naturally belong to each, if they were considered separately. In the third section the directors are authorized to mortgage "the whole or a part of the real or personal estate of said corporation." Stopping here, and taking this clause by itself, no inference can be drawn from it of an intention to give the power of mortgaging the franchises or future acquisitions and accessions of personal or real estate. This is the clause in which the authority to mortgage is directly conferred. If a more extensive power were intended to be given by the act, why is no mention made of it here? The argument drawn from this part of the act against the construction contended for by the bond-holders, goes upon the ground that this clause was intended to include and define all the powers of mortgaging conferred by the act.

But by the same section the trustees are authorized to sell, according to the conditions and limitations that may be contained in the mortgage deed, "the real and personal estate, and all rights, franchises, powers and privileges named in said mortgage deed." The directors therefore are authorized to *name* in the mortgage deed, not only the real and personal estate, but rights, franchises, powers and privileges of the corporation. The rights and franchises named in the deed are to be disposed of by sale, to enforce the mortgage security in the same way with the property mortgaged; and there is nothing from which it can be inferred that the rights and franchises, and the property of the corporation, are not to be named in the same way and conveyed in the same way by the deed; that is to say, the rights and franchises are to be conveyed and mortgaged like the property, and are to be disposed of under

the mortgage for the same purpose, and in exactly the same manner. The directors may *name* in the mortgage—in other words, they may convey in mortgage—any part or all the real and personal property, and any or all the rights, franchises, powers and privileges of the corporation. The act sets no limit on their discretionary power in this respect; and whatever the directors *name* in the mortgage which they give in behalf of the road, is to be disposed of in the same way for the satisfaction of the mortgage debt, whether it be the property or the rights and franchises of the corporation. The power to mortgage the rights and franchises, as well as the property of the corporation, is plainly and necessarily implied from these provisions of the act.

The act, therefore, does not limit the power of mortgaging to real and personal property on hand at the time, but gives authority to mortgage the rights and franchises of the corporation, which could not be done without the aid of the act. And it cannot be maintained that the authority to mortgage real and personal property given in one part of the act, was intended to be exclusive of all further power, when the further power of mortgaging the rights and franchises of the corporation is clearly given by necessary implication in another part of the same section. . . .

The directors then had power under the act to name in their mortgage, and to convey in mortgage to trustees, all the property, and all the rights, franchises, powers and privileges of the corporation. If they made such a mortgage it would convey to the mortgagees all the right and power which the corporation had to acquire and hold property, for the power to acquire and hold property is one of the rights and franchises of the corporation. That right would be conveyed and transferred from the road to the trustees by the mortgage deed, in the same way that the property was conveyed and transferred, subject to the condition of the mortgage; and the subsequently acquired property would pass under the mortgage as incident to the right of acquiring and holding it, which would be vested in the trustees by the mortgage.

The purchasers under the deed of the trustees "acquire all the rights, franchises, powers and privileges which said corporation possessed, and the use of said railroad, with all its property and rights of property, for the same purposes and to the same extent that said corporation could use the same, if said deeds had not been made, subject to the same liabilities as to the use of said railroad that said corporation would be under if said deed had not been made." All this the purchasers take through a sale authorized to

PLATT *v.* NEW YORK & SEA BEACH RAILWAY CO.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPT., 1896

(9 *App. Div.* 87)

APPEAL by the petitioner, August Meidling, as guardian *ad litem* of August Meidling, Jr., an infant, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the Clerk of the County of Kings on the 23d day of May, 1896, denying the petitioner's motion to vacate an order appointing a receiver and also a judgment entered in the action, or to modify the same.

This action was brought for the purpose of foreclosing a mortgage executed by the New York & Sea Beach Railway Company. On January 11, 1896, the plaintiffs in this action procured an order appointing a receiver of said company, and of all the property then owned by it. Subsequently a judgment of foreclosure was entered by which the receivership was continued and a sale directed of all the property in the receiver's hands. Thereupon the appellant, who is a judgment creditor of the New York & Sea Beach Railway Company, instituted this proceeding for the purpose of having the order appointing the receiver and the judgment of foreclosure and sale so modified as to affect only such property as the mortgagor had when the mortgage was executed.

HATCH, J. The validity of the mortgage is not controverted. But it is claimed that under it no lien was acquired upon the personal property purchased subsequent to its execution, as against the petitioner therein. That the lien should attach to after-acquired property is within the express terms of the mortgage, and it is not disputed that such is its effect as between the parties thereto.

giving effect to all parts of it, including the provision as to after acquired machinery and cars. This mortgage was duly recorded, and thus, by means of the record and the statute, the lien thereby created was duly notified to all persons having business relations with the Vermont and Massachusetts Railroad Company."—*Per* DEWEY, J.

The matter is now regulated by general statute in Massachusetts (Mass. Pub. Stat., 1882, Ch. 112, § 72). See *Federal Trust Co.* v. *Bristol County Street Ry. Co.*, 222 Mass. 35 (1915). So in several other States (Conn. Gen. Stat., 1888, § 3572; Minn. Gen. Stat., 1894, § 2724).

By the provisions of the statute (Laws 1850, c. 140, § 28, subd. 10), authority was conferred to mortgage the corporate property and franchises for the purpose of completing, furnishing or operating the railroad. And this authority has been continued in the same language under the revision of the railroad law (Laws 1892, c. 676, § 4, subd. 10). The statute contemplates that it may be necessary to borrow money for the purpose of the physical creation of the road and putting it in operation. It is quite evident that in the accomplishment of this purpose property would be created and acquired that had no actual or potential existence at the time when the loan was made and the mortgage given. It is the usual course of procedure in the construction of a railroad that money is raised by mortgage on its property, and that the structure is built and operated to a large extent by means of the loans thus obtained, and much of the property is created and acquired after the loan is made. The statute makes no distinction between property necessary for the completion and furnishing of the road and that which is essential to its operation. By the terms of the law, therefore, it was contemplated that, for the money thus obtained the property acquired should be pledged as the security for its repayment, and this cannot be accomplished without holding that the lien of the mortgage attaches to such property as shall be necessary for that purpose, whether it is in existence at the time when the mortgage is given or is subsequently acquired and whether such property be such as is denominated real or personal. So it was early held that such a mortgage created in equity a lien upon property subsequently acquired superior to the lien of a subsequent incumbrance by mortgage or judgment (*Seymour* v. *Canandaigua & Niagara Falls R. R. Co.*, 25 Barb. 284; *Benjamin* v. *Elmira, Jefferson & Canandaigua R. R. Co.*, 49 *id.* 447; *Stevens* v. *Watson*, 4 Abb. Ct. App. Dec. 302). In those cases the question arose respecting liens upon subsequently acquired real property. But the discussion shows that the court considered the rule applicable as well to personal as to real property. Such has been the uniform rule applied in the Federal courts (*Mitchell* v. *Winslow*, 2 Story, 630; *Central Trust Co.* v. *Kneeland*, 138 U. S. 419).

The difficulties which have arisen relate not so much to the recognition of the mortgage as a lien, for the doctrine of the above-cited cases has never been questioned, but rather to the steps necessary to be taken to evidence the lien. The first debate arose over the question whether the rolling stock and equipment of the road retained its character as personal property, and if so, was it requi-

on the 1st of June, 1852. The mortgage, which had been in the meantime recorded, was conditioned for the payment of $200 and interest, with the additional clause: "According to the condition of a certain bond obligatory bearing even date herewith."

On the 12th of July following, Spicer was indebted to the respondent, Stoddard, in the sum of $500, for rent due and to become due, and with full and specific information from Spicer of all the foregoing facts, Stoddard took a subsequent mortgage on the premises for the amount of his debt; and afterwards, in January, 1853, he obtained from Spicer a deed of the property, which was received in satisfaction of his mortgage.

On the 25th of February, 1853, the defendant commenced a foreclosure by advertisement, claiming the amount due to be $380, with interest. The plaintiff, on the 1st of March, tendered as the amount due, the sum of $200, with interest and costs, and demanded a satisfaction piece, which the defendant refused. The referee decided that the defendant had no lien on the premises except for the $200 and interest, and that the mortgage should be cancelled on payment of that amount, with costs.

The judgment entered upon the referee's report was affirmed on appeal at general term in the Eighth District, and the defendant appealed to this court.

COMSTOCK, Ch. J. In a loose and general sense the equity of this case is on the side of the defendant, because he made the subsequent advance of $180, it being agreed that this, as well as the original sum of $200, should be considered as secured by the mortgage. The question, however, is, whether the rules of law will give that effect to the transaction.

It will be convenient first to determine the legal construction and effect of the mortgage, unaided by the parol facts, but read in connection with the bond to which it is collateral. On the part of the defendant it is contended that the two instruments, constituting, as they do, a single security, are to be read as one; and, therefore, that the new advance, being written in the condition of the bond, is it to be deemed actually incorporated in the condition of the mortgage also, so as to render the latter a legal security for both the sums in question. This proposition does not require, nor does it admit, any aid from the understanding of the parties derived from the extrinsic evidence. If it be a sound one, it is universally sound; so that, if a bond be given for $2000 actually loaned, and a mortgage collateral thereto be given for $1000, the

latter is always to be read and construed as a security for the larger sum. The instrument being legally perfect, there is no occasion to reform it, or to involve the doctrine of equitable lien, or specific performance, or any kindred doctrine of equity.

I think this proposition cannot be maintained. A bond and mortgage are two instruments, although one may be collateral to the other. The one is a personal obligation for the debt; the other creates a lien upon land for the security of that debt, and it may well be for a portion of the debt instead of the whole. If the personal obligation expresses two sums, and the collateral instrument expresses only one of them, I see no reason why each should not be construed according to its own terms. So, if the condition of a bond be for a larger, and that of the mortgage be for a smaller sum, the obvious effect of both the instruments is that the maker binds himself generally for the whole debt, while he specially pledges the mortgaged land for only a given part of it. In this case the written condition of the bond is to pay the $200, and the further sum of $180; while that of the mortgage is only to pay the $200. Each instrument is perfect, and each admits of a plain construction and effect according to its own language. If we do not look outside of them, there is no ambiguity. A debt was created, consisting of two sums. The land was mortgaged for one of those sums only.

In the next place, if the doctrine were admitted that a mortgage passes the freehold or legal estate in lands, it would probably follow that a parol agreement that the security should stand for a new advance would be good against the mortgagor or any one claiming under him not having the rights of *bona fide* purchasers. The title being conveyed by the instrument, the equities of the parties might be adjusted or modified by any new agreement without a writing. But it is entirely settled with us that such is not the nature or effect of a mortgage. With us a mortgage is a lien or security only, and not in any sense a title (*Kortright* v. *Cady*, 21 N. Y. 343, and cases cited). This ground of sustaining the defendant's lien for the additional advance, therefore, cannot be maintained. The defendant has no title to the land in question; and we have already seen that he has no legal mortgage for a greater sum than $200.

At the commencement of this suit the defendant was proceeding to foreclose his mortgage, by advertising to sell the premises under the power of sale contained in the instrument; and he claimed in his notice both the sums of money in question. The

mortgage, and was given to secure a loan of $1500 made by Bliss to Striker, but in form was an absolute deed, and was recorded November 11th, 1891. Bliss when he took his mortgage made no search of the title and had constructive notice only of the Weil mortgage. The question is whether Robert or Bliss is entitled to the surplus moneys. We think the conclusion of the General Term that Bliss is entitled to them is correct.

The Weil mortgage was extinguished by payment before Striker applied to Robert for a loan, and Robert had notice that the mortgage had been paid by Striker. Striker delivered to him the satisfaction executed by Weil, and there is no pretence that it did not represent the actual fact that Striker had paid the mortgage. What Striker undertook to do was to re-issue the mortgage and the bond to secure another loan equal to the amount of the mortgage. Robert assented to this proposition and made the loan on the faith of the proposed security. But there was no writing and no actual assignment of the mortgage until after Bliss had taken his mortgage. All that Robert had until the assignment was made was the possession of the bond and the satisfaction of the mortgage and the verbal agreement of Striker that the mortgage should be assigned.

In this State a mortgage is a lien simply, and the general principle is well settled that on payment the lien is *ipso facto* discharged and the mortgage extinguished. There are many cases where, for purposes connected with the protection of the title or the enforcement of equities, what is in form a payment of a mortgage, will be treated as a purchase, so as to preserve rights which might be jeoparded if the transaction was treated as a payment. But we know of no principle which permits a mortgagor who has paid his mortgage and taken a satisfaction, there being at the time no equitable reason for keeping it afoot, subsequently to resuscitate and re-issue it as security for a new loan or transaction and especially where the rights of third parties are in question. It would make no difference in our view whether the re-issue of the mortgage was before or after new rights and interests had intervened. We do not speak of the position of a subsequent grantee or mortgagee having actual notice of the re-issue of a satisfied mortgage before he takes his mortgage or deed. It is possible that the circumstances of the re-issue may be such as to furnish ground for a court of equity to intervene and compel the execution of a new mortgage, to accomplish the real purpose of the parties, and notice of such circumstances to the subsequent grantee or mortgagee

might, perhaps, under special conditions, subject his right to the prior equity. But the contention that a person having at the time notice that a mortgage had been paid by the mortgagor in usual course, can, by a verbal arrangement between himself and the mortgagor, give the extinct mortgage vitality again as security for a new loan, so as to give it priority over a subsequent conveyance or mortgage is not justified by the authorities in this state.

The Statute of Frauds does not permit mortgages on land to be created without writing. The re-issue of a dead mortgage, if effect is given to the transaction, is in substance the creation of a new mortgage. If this was permitted it would furnish an easy way to evade the statute. The law wisely requires that instruments by which land is conveyed or mortgaged should be executed with solemn forms, and that their existence should be made known through a system of registry so as to protect those subsequently dealing with the premises. Public policy requires that dealings with land should be certain, and that transactions affecting the title should be open, and that secret agreements should not be permitted by which third persons may be misled or deceived. It would be a convenient cloak for fraud if a mortgagor, having paid a mortgage, could retain it in his possession uncancelled of record and reissue it at pleasure. A party taking from a mortgagor a re-issued mortgage has notice which should put him upon inquiry, and he takes at the peril that it has in fact been paid.

In the present case, not only had the mortgage been paid before Robert made his loan, but he knew the fact from incontestable evidence. If he had received an actual assignment before Bliss had taken his mortgage, he would not, we think, have been entitled to preference. Upon the facts actually existing he had merely an agreement for an assignment, which at most created an equity enforceable by equitable action, and meanwhile Bliss had obtained a legal mortgage, having no notice of the agreement. Bliss had constructive notice of the mortgage to Weil. His mortgage was subject to that incumbrance unless the mortgage had been paid. But he did not take subject to an arrangement between Striker and Robert to revive the mortgage, the lien of which had been extinguished by payment. The case of *Mead* v. *York*, 6 N. Y. 449, is a direct authority upon the question here presented. It was there held that a mortgage after being once paid by the mortgagor cannot be kept alive by a parol agreement as security for a new liability incurred for the mortgagor as against the latter's subsequent

mentioned, and the fact being that the defendant is in possession under Sarah Howland, the remaining question is, whether the plaintiff can maintain ejectment on his legal title against a party clothed with her equitable interest. It is well settled, that a mortgagee in possession, the mortgage being forfeited by non-payment, can defend himself in a possessory action brought by the mortgagor, though, if he were out of possession, he could not now maintain ejectment against the latter (*Phyfe* v. *Riley*, 15 Wend. 248). But this, I think, is not so, except in the case of a technical mortgage, conveying, subject to the condition, a legal title to the premises (*Marks* v. *Pell*, *Jackson* v. *Parkhurst*, *supra*). If the present were, therefore, an action of ejectment, prosecuted under the former practice, in which nothing but legal principles could be taken into consideration, then, as the deed from Aylesworth to Mrs. Howland has been found to be fraudulent, I think the defendant could not resist the plaintiff's title. But, since the blending of legal and equitable remedies, a different rule must be applied. The defendant can defeat the action upon equitable principles; and if, upon the application of these principles, the plaintiff ought not to be put into possession of the premises, he cannot recover in the action. It has been shown that the premises were, in effect, mortgaged to Howland and his wife to secure the performance of Aylesworth's agreement to support them and the survivor of them during life, and that the plaintiff has taken the place of Aylesworth. When he obtained title by the execution of the sheriff's deed, Aylesworth had been in default in the performance of his agreement for nearly three years. Mrs. Howland and her grantees, it is true, had been in possession, and had enjoyed the use of the premises, but no account has been taken to show how far the income derived from that source would go in fulfilment of the agreement. This action is not brought for a redemption, and is not adapted to that kind of relief. It would be manifestly inequitable to let the plaintiff into possession until he shall procure an account to be taken, and shall pay or tender the amount which shall be found in arrear upon the above mentioned agreement, executed by Aylesworth, for the support of Mrs. Howland up to the time of her death.

The judgment of the Supreme Court must be reversed; and, as we cannot certainly say what case the plaintiff may make, now that the legal principles which govern the action have been determined, there must be a new trial, with costs to abide the event. If the main features of the case cannot be changed, the only remedy

for the plaintiff is to institute a suit for redemption, upon the principles which have been mentioned.

All the judges concurring,

Judgment reversed, and new trial ordered.[1]

BURDICK *v.* JACKSON

SUPREME COURT OF NEW YORK, GENERAL TERM, 1876

(7 *Hun*, 488)

APPEAL from a judgment entered on the report of a referee dismissing the complaint.

The action was brought by the plaintiff as assignee in bankruptcy, to set aside a mortgage given by the bankrupt to his nieces, the defendants, Ida J. Jackson and Carrie A. Jackson, on the ground that it was a fraudulent preference under the bankrupt act. The mortgage was executed eighteen days before the filing of the petition in bankruptcy, but was given in pursuance of a parol agreement between the bankrupt and the guardian of the infants more than fifteen months before.

This appeal was argued at the January term, 1875, and a reargument ordered at the October term following.

GILBERT, J. We concur fully with the referee in his conclusions of fact and of law. One of the first principles of equity is that it looks upon things agreed to be done, as actually performed. Acting upon this principle, courts of equity in England and in this country have held that an agreement based upon a valuable consideration to give a mortgage, will be treated in equity as a mortgage. That doctrine has been acted upon so frequently and for so long a period of time that it may justly be regarded as forming a part of the law of the land (Story Eq. Jur., § 553; *Russel* v. *Russel*, 1 Bro. C. C. 269, and notes to that case in 1 Lead. Cases Eq. 541; *Read* v. *Simons*, 2 Desauss. 552; *Welsh* v. *Usher*, 2 Hill Eq. 167; *Dow* v. *Ker*, 1 Spen. Eq. 414; *Bank* v. *Carpenter*, 7 Ohio, 21; *In re Howe*, 1 Paige, 125; *Chase* v. *Peck*, 21 N. Y. 581; Willard Eq., Potter's ed. 441, *et seq*). If, therefore, the agreement of December, 1871, had been made directly with the defendants, Ida and Carrie, there can be no question that it would have given them a

[1] See *Hall* v. *Hall*, 50 Conn. 104 (1882).

United States, except where established by the local law, as, for instance, in Ohio (*Bayley* v. *Greenleaf*, 7 Wheat. 46; *Tiernan* v. *Beam*, 2 Ohio, 383), in Georgia (*M'Lean* v. *M'Lellan*, 10 Pet. 625, 640; *Harden* v. *Miller*, Dudley, 120), and in the District of Columbia (*Chilton* v. *Brand*, 2 Black, 458); the doctrine having been previously affirmed in the States of Maryland and Virginia, out of which the district had been formed (*Moreton* v. *Harrison*, 1 Bland, 491; *Redford* v. *Gibson*, 12 Leigh, 332); although it has since been abolished in Virginia by statute (*Yancey* v. *Mauck*, 15 Grat. 300).

The decisions in the courts of those and many other States in favor of the doctrine, which are collected in the notes to 2 Sugden on Vendors, 8th Am. ed., c. 19, suggest no reasons and afford no grounds why we should now for the first time adopt in this Commonwealth a doctrine which has never been supposed by the profession to be in force here; which would introduce a new exception to the statute of frauds; which, as experience elsewhere has shown, tends to promote uncertainty and litigation; and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties. If no third person has acquired any rights in the land by *bona fide* attachment or conveyance, the original vendor may secure payment of the debt due him for the purchase money by the usual attachment on mesne process. If any third person has acquired rights in the property, there is no reason why equity, any more than the common law, should interpose to defeat them.

It may be doubted whether, upon the case stated in the bill, the plaintiff would be held entitled to the lien which he asserts in those courts which recognize the existence of a vendor's lien for unpaid purchase money (1 Perry on Trusts, § 235). But as we are clearly of opinion that no such lien exists in this Commonwealth in any case without agreement in writing, we do not propose to entangle ourselves in the refinements and embarrassments which are inseparable from its judicial consideration and affirmance.

ELTERMAN *v.* HYMAN

COURT OF APPEALS OF NEW YORK, 1908

(192 *N. Y.* 113)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 14, 1907, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

This action was brought to recover the amount paid upon a contract for the purchase of land as well as the amount incurred for expenses in examining the title and to establish and enforce a lien therefor upon the ground that the plaintiff was ready and willing to perform while the defendant was not because the title was unmarketable. The answer admitted the contract and the payment made thereon, but denied the remaining allegations of the complaint. It alleged facts constituting a counterclaim and asked that the plaintiff be adjudged to specifically perform by paying the balance of the purchase price.[1]

VANN, J. The question remains whether a vendee, not in possession and with no special equity, has a lien for the amount paid on a contract for the purchase of land that can be foreclosed upon the default of the vendor? The Appellate Division in the first department, after thorough discussion, two elaborate opinions having been written, one on either side, has held that a lien exists for the amount paid on the contract, but not for the expense of examining the title. (*Occidental Realty Co.* v. *Palmer*, 117 App. Div. 505.) The rule in the second department is that no lien exists even for the purchase money paid down, unless the vendee has taken possession. (*Klim* v. *Sachs*, 102 App. Div. 44.) The subject was not considered at length in the case last cited, only three sentences being devoted to it; and while the judgment was modified by striking out the part giving a lien, it was affirmed as to the recovery of the sum paid on the contract, although the action was in equity. This case was followed without discussion by the same court in *Krainin* v. *Coffey* (119 App. Div. 516).

The right of a vendor to a lien for the purchase money unpaid is well established, and the courts of this state have uniformly recog-

[1] Statement of facts abridged. Only portion of the opinion of VANN, J., is printed.

VANIMAN *v.* GARDNER

APPELLATE COURT OF ILLINOIS, THIRD DISTRICT, 1901

(99 *Ill. App.* 345)

STATEMENT.—On April 11, 1895, Anthony Roberts and his wife entered into the following written agreenment with their son, Moss Roberts:

"Agreement between Anthony Roberts and Sarah J., his wife, of the first part, and Moss Roberts, their son, second part. Witnesseth, that said Anthony Roberts is the owner of the N. W. ¼ of the N. W. ¼ section 24, township No. 12, range No. 6, west of the 3rd P. M., in Macoupin county, Illinois, on which all of said parties reside and occupy as a homestead; and, whereas, it is desirable that a new house shall be erected on said tract of land for the comfort and use of all said parties so long as they shall live upon said tract of land. It is therefore agreed by the said parties that said Moss Roberts shall erect on said premises a house which shall be convenient and suitable for the use of said parties, including the family of Moss Roberts. That Moss Roberts shall have the right to pull down the old house now on said premises and use the material thereon fit to be used in building the new house, and said new house shall be built and completed within the next ninety days after the date of this agreement.

And in consideration of the said building, the said parties of the first part agree that in case they shall sell the said tract of land, then there shall be due and payable to said Moss Roberts out of the money arising from such sale the sum of $500, together with interest thereon, from the time of the completion of said house until paid, at the rate of six per cent per annum, and in case of the death of the said Anthony Roberts leaving no will by virtue of which said Moss Roberts shall become devisee and owner of said tract of land, then and in that case, there shall be paid to said Moss Roberts, out of the estate of said Anthony Roberts, the said sum of $500, together with six per cent interest thereon from the completion of said house until paid.

(Signed) Anthony Roberts, (Seal.)
Sarah J. Roberts, (Seal.)
Moss Roberts." (Seal.)

The instrument was filed for record and recorded in the recorder's office of Macoupin county, July 12, 1895.

The house was built by Moss Roberts with money obtained from a bank at Virden, Illinois, on notes executed by him and George Vaniman as security. The written agreement was delivered to Vaniman and afterward indorsed as follows:

"I assign the benefit of the within contract to George Vaniman as security to him for signing notes.

(Signed) Moss Roberts."

In 1898 Anthony Roberts and wife conveyed the land to Martha J. Roberts, who, on August 18, 1900, executed note and mortgage on the land to Alva L. Gardner, to secure an indebtedness of $500, due ten days after date. Gardner filed a bill to foreclose. Appellants, the administrators of George Vaniman, who were made defendants, together with others, answered and filed a cross-bill, in which they set up that there was a lien in favor of the deceased, by virtue of the above quoted agreement, and its assignment, and a payment by them, as administrators of Geo. Vaniman, of the notes on which he was surety for Moss Roberts. The court sustained a demurrer to the cross-bill, holding that appellants had no lien on the land, and rendered a foreclosure decree in favor of Gardner.

Mr. Presiding Justice Harker delivered the opinion of the court.

It is contended by appellant, first, that under the written agreement of April 11, 1895, an equitable lien or mortgage was given Moss Roberts upon the land in question, whereby equity will enforce the payment of the $500 specified in the agreement, as a first lien upon the land; second, that appellants are subrogated to all rights of Moss Roberts under the agreement by virtue of his assignment thereof to George Vaniman.

While, as a general rule, any written contract entered into for the purpose of pledging property or some interest therein as security for a debt, which is informal or insufficient as a common law or statutory mortgage, but which shows that it was the intention of the parties that it should operate as a charge upon the property, will constitute an equitable mortgage and may be enforced as such in a court of equity, yet a mere promise to pay out of the proceeds of the sale of the property is not sufficient to create an equitable mortgage upon the property itself.

"The intention must be to create a lien upon the property, as distinguished from an agreement to apply the proceeds of a sale of it to the payment of a debt." Jones on Liens, Sec. 32;

was in writing; it was entered in the journal of the convention, and the defendant was bound to conform to it (C. 13, Laws of 1870, *supra*).

Second. The plaintiff's case is within the general doctrine of equity, which gives a right equivalent to a lien, when in no other way the rights of parties can be secured.[1] The advances were directly for the benefit of the real estate; they were approved by the convention by whose directions the title was conveyed to the defendant, but neither the convention nor the defendant have incurred any corporate liability, and while it may be said that the advances were made on the promise of, or in the just and natural expectation that, a mortgage would be given, it is also true that they were made on the credit of the property, for the improvement of which they were expended. The repairs and improvements were permanently beneficial to it, made in good faith, with the knowledge and approbation of the parties interested, and accepted by them, not as a gratuity, but as services for which compensation should be given. The plaintiff's right to remuneration is clear, and unless the remedy sought for in this action is given, there will be a total failure of justice.

It would seem to follow that no error was committed by the referee in directing a sale of the property, and the application of the proceeds to the payment of the plaintiff's claim. But the learned counsel for the appellant argues that as the defendant's relation to the property is that of trustee, such enforcement of the lien would destroy the trust, and so defeat the very object of the conveyance through which they derive title. The trust was for the habitation and use of the bishop of the diocese; it was accepted with notice that the improvements were necessary to fit the buildings for occupation, and had been begun under proper authority. It was the duty of the defendant to allow them to be finished, and it will be no violation of the conditions upon which the premises are held, to subject them to a charge for the cost of the repairs through which alone the purposes of the trust were accomplished. If the building should now be burned, it might with the same force be urged that the mechanic who might repair or reconstruct it could acquire no lien, because enforcing it might diminish or even absorb the property. A statutory lien would be no better than the plaintiff's lien in equity.

The usual course of enforcing an equitable lien is by a sale of

[1] See, also, *Sullivan* v. *Corn Exchange Bank*, 154 App. Div. 296, 139 N. Y. S. 97, 101 (1912).

the property to which it is attached, and we find nothing in this case to take it out of the general rule. The appellant's remaining point is a sweeping one relating to various items of evidence of the bishop's declarations, letters and acts in connection with the purchase and repairs of the house. Under the circumstances disclosed in the record, they were properly received, either as acts of agency, or part of the transaction.

We think the decision of the referee was warranted by the facts before him, and that the judgment appealed from should be affirmed.[1]

All concur. *Judgment affirmed.*[2]

SMITH *v.* SMITH

Court of Appeals of New York, 1891

(125 *N. Y.* 224)

O'Brien, J. The plaintiff sought by this action to compel the defendant, who is his wife, to convey to him certain real estate of which she holds the title, or to have a lien in his favor declared thereon. The courts below have held that he was entitled to the lien, but not to the conveyance, and as there is no appeal except by the defendant, it is only necessary to examine the grounds upon which the right to such lien was based.

In the year 1863 the plaintiff was the owner of the real estate described in the complaint, and concerning which the relief was demanded. On the twenty-first of September in that year he conveyed it through a third party to the defendant, who has ever since held the title, though the plaintiff has managed it and collected the rents and applied what was not expended in the payment

[1] Compare *Bright* v. *Boyd*, 1 Story, 478 (1841), in which improvements made by a *bona fide* purchaser of land whose title proved defective were allowed as "a lien and charge on the estate."—*Per* Story, J., 2 Story, 608.

[2] In *Hamilton Trust Co.* v. *Clemes*, 163 N. Y. 423 (1900), *held*, a mortgage given by a corporation in an effort to perform a legal obligation to give a first mortgage upon its assets under a contract entered into by the original directors of the corporation with another corporation, which contract is fully performed on its part, is valid in equity as against junior judgment creditors, even though there was a failure on the part of the corporation to observe certain statutory requirements. The principal case and *Chase* v. *Peck*, *supra*, were chiefly relied upon by the court. (See opinion, pp. 428–9.)

property of value in discharge of his liability. The finding, unanimously affirmed, is that the money was paid and the property delivered as a result of the director's action and by reason of the services rendered by the plaintiff therein. The finding also is that the value of the services is $1,000. The corporation, appropriating the benefit of the services, refuses to compensate the plaintiff, and resists his effort to establish a lien on the proceeds of the suit.

We think the lien should be sustained. We assume, in accordance with our decision in *Matter of Meighan* (106 App. Div. 599; 182 N. Y. 558), that the statutory lien created by section 475 of the Judiciary Law for the benefit of an attorney is not enforceable under such conditions. That case was a proceeding by petition under the statute. The court held that in a suit by a stockholder for the benefit of a corporation, the statutory lien of the attorney does not attach to the money paid to the corporation perforce of the judgment. This case presents a very different situation. We are not now dealing with a statutory lien to be enforced in a statutory proceeding. We are dealing with a lien independent of statute, to be enforced in a plenary suit in equity. The director who was the plaintiff in the accounting suit might have paid the attorney with his own money. If he had done so, he would have had a lien for his own reimbursement on the property recovered to the use of the corporation as a result of his action. The rule is that a trust fund bear the expenses of its administration, and that a trustee who conducts a litigation to protect the subject of the trust, has a charge on the fund for expenses incurred in the performance of his duties (*Woodruff* v. *N. Y., L. E. & W. R. R. Co.*, 129 N. Y. 27; *Meddaugh* v. *Wilson*, 151 U. S. 333, 343; *Central R. R. & B. Co. of Ga.* v. *Pettus*, 113 U. S. 116). The law which imposes on a director the duty to hold a delinquent officer to account (*Miller* v. *Quincy*, *supra*), does not deny him indemnity for the expenses of the accounting. The lien enforceable by this plaintiff, is not, therefore, the statutory lien of an attorney. It is a contractual lien, acquired by succession to the potential lien of the plaintiff in the action for an accounting. The plaintiff in that action, instead of paying the attorney with his own money, and seeking reimbursement out of the fund, chose another and for himself a safer course. He refused to assume personal liability for the attorney's services, but agreed that the attorney should have a lien on the cause of action and its proceeds. That was a lawful contract. It was a contract for the transfer to the attorney of the

equitable lien of the trustee (*New* v. *Nicoll*, 73 N. Y. 127, 131). A trustee, who is unwilling to assume personal liability for services essential to the protection of the trust, has the power, if other funds fail, to create a charge, equivalent to his own lien for reimbursement, in favor of another by whom the services are rendered (*Noyes* v. *Blakeman*, 6 N. Y. 567, 579; *New* v. *Nicoll*, *supra*). That is exactly what this director undertook to do. We think a court of equity will give effect to his engagement. The plaintiff rendered services of value, which the corporation has appropriated without requital. The plastic remedy of an equitable lien is adequate in such a case to prevent a failure of justice (*Perry* v. *Board of Missions*, 102 N. Y. 99, 105; *Meighan* v. *Am. Grass Twine Co.*, 154 Fed. Rep. 346).

The point is made that relief must be denied the plaintiff because since this action was begun, the corporation was adjudged a bankrupt, and the trustee in bankruptcy substituted as a defendant. In such circumstances, the trustee's title is subject to the plaintiff's equitable lien, and to the pending action to foreclose it (*Metcalf* v. *Barker*, 187 U. S. 165; *Pickens* v. *Roy*, 187 U. S. 177). It may be that the state court is without power to take the fund from the possession of the court of bankruptcy (*Skilton* v. *Coddington*, 185 N. Y. 80, 85, 86; *Frank* v. *Volkommer*, 205 U. S. 521, 529). It has power, however, in this action, to which the trustee has voluntarily become a party, to declare the rights and interest of the litigants in the subject-matter of the controversy. "We may assume," as we said in *Skilton* v. *Coddington* (*supra*), "that the bankruptcy court will give effect to any judgment recovered therein."

The facts essential to the plaintiff's case are established by the findings. A new trial is, therefore, needless (Code Civ. Pro., sec. 1337; *Farleigh* v. *Cadman*, 159 N. Y. 169). The judgment should be reversed; the plaintiff should be decreed to have a lien upon the sum of $3,500 in the hands of the trustee in bankruptcy, the proceeds of notes and mortgage transferred by Wischerth to the corporation; the amount of the lien should be fixed at $1,000 with interest from September 6, 1911, and costs of this action in all courts; and there should also be a personal judgment in favor of the plaintiff for the amount of any deficiency remaining after the lien has been enforced.

Willard Bartlett, Ch. J., Werner, Collin, Cuddeback, Miller and Seabury, JJ., concur.

Judgment reversed, etc.

the payment of the $2,000 it had advanced under the belief. She knew such fact and the further fact that her signature was a forgery. The right to foreclose the lien securing the interest, upon a default in its payment, is usual and ordinary, and, it may be presumed, such fact was likewise known to her. We are not required to consider what results an action for the foreclosure of the mortgage, because of a default in the payment of interest due October 1, 1900, would have produced. A reasonable, if not necessary, inference would seem to be that a disclosure of the forgery or a completed foreclosure would be consequent. It is sufficient, however, for the purposes of our review that, if the interest had not been paid, the right to foreclosure would have arisen and that she having full knowledge of the facts paid the interest and thus prevented the upspringing of the right and the exercise of it by the defendant. (*Continental Nat. Bank* v. *National Bank of the Commonwealth*, 50 N. Y. 575; *Voorhis* v. *Olmstead*, 66 N. Y. 113.) She by making the payments recognized the mortgage and the lien it seemed to create as real and existing, extended their existence and retarded or intercepted the natural growth and development of the rights and relations between the defendant and her son, and benefited her son and, presumptively, with her contemplation, herself. She could not be permitted to thereafter repudiate the mortgage. The payments of the interest made by her and their effects, and a subsequent repudiation of the mortgage by her would be inconsistent with each other, would not be responsive to the demands of justice and good conscience and would effect a fraudulent result. When a party with full knowledge, or with sufficient notice of his rights and of all the material facts, freely does what amounts to a recognition or adoption of a contract or transaction as existing, or acts in a manner inconsistent with its repudiation, and so as to affect or interfere with the relations and situation of the parties, he acquiesces in and assents to it and is equitably estopped from impeaching it, although it was originally void or voidable. (*Vohmann* v. *Michel*, 185 N. Y. 420; 2 Pomeroy's Equity Jurisprudence [3d ed.], sections 816–821, 965.)

It is not necessary that an equitable estoppel rest upon a consideration or agreement or legal obligation. The courts apply it, in accordance with established general principles, in order that the transactions and dealings may result justly and fairly with the parties concerned with them; and it operates against an unjust repudiation of a sealed or a forged instrument. It does not require the positive, distinct action or language needed and intended to

renew and ratify a transaction and make it valid and binding; it prohibits a person, upon principles of honesty and fair and open dealing, from asserting rights, the enforcement of which would, through his omissions or commissions, work fraud and injustice. It would have prohibited Caroline from maintaining in her lifetime this action, and manifestly the right of the plaintiff is only that held by her.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, HAIGHT, VANN and HISCOCK, JJ., concur; WERNER, J., dissents.

Judgment reversed, etc.

PEOPLE'S TRUST CO. *v.* SMITH

COURT OF APPEALS OF NEW YORK, 1915

(215 *N. Y.* 488)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department entered March 3, 1913, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

CARDOZO, J. The defendants Smith delivered to the defendant George F. Stainton, described in the record as George F. Stainton, No. 1, a bond and mortgage to secure a debt of $3,000. The mortgagee had a nephew of the same name, who is a member of the bar. He is described in the record as George F. Stainton, No. 2. The uncle placed the bond and mortgage, with other papers, in a separate bundle, and left them, solely for safekeeping, in the safe in the nephew's office. The nephew purloined the bond and mortgage, and attempted to assign them to the plaintiff, the People's Trust Company. He executed, in his own handwriting, a document in the form of an assignment, and on that security obtained from the plaintiff a loan of $2,000. The payment of the loan was guaranteed by the defendant Ward. The bond and mortgage were delivered to the plaintiff together with the assignment. Stainton, No. 1, had no knowledge of the transaction. His good faith is conceded. The good faith of the plaintiff and of Ward, the guar-

CHAPTER II

SECURITY

Section I.—Mortgage and Conditional Sale

ST. JOHN *v.* WAREHAM

Court of Chancery, 1635

(3 *Swanst.* 631)

The defendants, for 3000*l.*, conveyed the lands to Sir Richard Grobham and his heirs; Sir Richard made a lease to Wareham, rendering to him and his heirs 230*l.* per annum, and this lease was for seven years, with a *nomine poenæ* distress and clause of re-entry, and a proviso, that if Wareham and his heirs should within seven years be desirous to repurchase, and signify the same to Sir Richard Grobham, his heirs and assigns, and pay them 3000*l.*, then he and they to assure to Wareham. *Lord Coventry, Richardson*, Chief Justice, and *Crook*, decreed the money to the heir of Sir Richard G., and not to the plaintiff, Saint John, who was his executor, and justly; for this was not the case of a mortgage, but of an absolute purchase; for the proviso could not turn it to a mortgage, but was a mere collateral agreement, for which there was no remedy in equity after the seven years. And so it was ruled in this court, 16 Car. 2, *Cage* v. *Sir Ralph Bovy;* and again, T. 24 Car. 2, in *Isaac Cottington* v. *Lord Cornbury*, where the covenant was to reconvey, upon the repayment of the purchase money within seven years. But if the purchase money had not been near the value of the land, that and such like circumstances might have made it a mortgage.—*Per* Lord Nottingham, L. Ch., in *Thornborough* v. *Baker*, 3 Swanst. 628.[1]

[1] And see, *Mellor* v. *Lees*, 2 Atk. 494 (1742); *Longuet* v. *Scawen*, 1 Ves. Sr. 402, 405 (1749).

CONWAY *v.* ALEXANDER

SUPREME COURT OF THE UNITED STATES, 1812

(7 *Cranch*, 218)

THIS was an appeal from the Circuit Court for the District of Columbia, sitting in Chancery, at Alexandria.[1]

MARSHALL, Ch. J., delivered the opinion of the Court as follows:

This suit was brought by Walter S. Alexander, as devisee of Robert Alexander, to redeem certain lands lying in the neighborhood of Alexandria, which were conveyed by Robert Alexander, in trust, by deed dated the 20th of March, 1788, and which were afterwards conveyed to William Lyles, and by him to the testator of the plaintiffs in error.

The deed of the 20th of March, 1788, is between Robert Alexander of the first part, William Lyles of the second part, and Robert T. Hooe, Robert Muire and John Allison of the third part. Robert Alexander, after reciting that he was seised of one undivided moiety of 400 acres of land, except 40 acres thereof previously sold to Baldwin Dade, as tenant in common with Charles Alexander, in consideration of eight hundred pounds paid by William Lyles, and of the covenants therein mentioned, grants, bargains and sells twenty acres, part of the said undivided moiety, to William Lyles, his heirs, and assigns forever, and the residue thereof, except that which had been previously sold to Baldwin Dade, to the said Robert T. Hooe, Robert Muire and John Allison, in trust, to convey the same to William Lyles at any reasonable time after the first day of July, 1790, unless Robert Alexander shall pay to the said William Lyles, on or before that day, the sum of £700 with interest from the said 20th day of March, 1788. And if the said Robert Alexander shall pay the said William Lyles on or before that day the said sum of £700 with interest, then to reconvey the same to the said Robert Alexander. Robert Alexander further covenants that, in the event of a reconveyance to him, the said twenty acres sold absolutely shall be laid off adjoining the tract of land on which William Lyles then lived. The trustees covenant to convey to William Lyles, on the non-payment of the said sum of £700; and to reconvey to Robert Alexander in the event of payment. Robert Alexander covenants for further assurances as to

[1] The statement of facts is omitted.

itself, in the opinion of some of the judges, furnish irresistible proof that a sale could not have been intended. If lands were sold at £5 per acre conditionally, which, in fact, were worth £15, or £20, or £50 per acre, the evidence furnished by this fact, that only a security for money could be intended, would be, in the opinion of three judges, so strong as to overrule all the opposing testimony in the cause.

But the testimony on this point is too uncertain and conflicting to prevail against the strong proof of intending a sale and purchase, which was stated. The sales made by Mr. Dick and Mr. Hartshorne of lots for building, although of land more remote from the town of Alexandria than that sold to Lyles, may be more valuable as building lots, and may consequently sell at a much higher price than this ground would have commanded. The relative value of property in the neighborhood of a town depends on so many other circumstances than mere distance, and is so different at different times, that these sales cannot be taken as a sure guide. That twenty acres, part of the tract, were sold absolutely for £5 per acre; that Lyles sold to Conway at a very small advance; that he had previously offered the property to others unsuccessfully; that it was valued by several persons at a price not much above what he gave; that Robert Alexander, although rich in other property, made no effort to relieve this, are facts which render the real value, at the time of sale, too doubtful to make the inadequacy of price a circumstance of sufficient weight to convert this deed into a mortgage.

It is, therefore, the opinion of the Court that the decree of the Circuit Court is erroneous and ought to be reversed, and that the cause be remanded to that court with directions to dismiss the bill.[1]

Decree reversed.

COYLE v. DAVIS, 116 U. S. 108 (1885). "The volume of proof taken on the issue thus raised is large, and the evidence is contradictory, as is common in such cases where, admittedly, a loan of some kind was at some time talked about. The conveyance to Davis of the undivided one-third interest of Coyle, being to him, his heirs and assigns forever, with a covenant of warranty, and without a defeasance, either in the conveyance or in a collateral

[1] See also *Robinson* v. *Cropsey*, 2 Edw. Ch. (N. Y.) 138 (1833); *Rich* v. *Doane*, 35 Vt. 125 (1862); *Cornell* v. *Hall*, 22 Mich. 377 (1871); *Hanford* v. *Blessing*, 80 Ill. 188 (1875); *Randall* v. *Sanders*, 87 N. Y. 578 (1882).

paper—the parol evidence that there was a debt, and that the deed was intended to secure it and to operate only as a mortgage, must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail. This well-settled rule of equity jurisprudence was applied by this court in *Howland* v. *Blake*, 97 U. S. 624, 626. The case stated in the bill herein is not supported by the weight of evidence. On the contrary, it sustains the allegations of the answer. Especially, the force of the letter of Coyle to Davis, of June 11, 1867, is not broken by any satisfactory explanation. It would serve no useful purpose to discuss the testimony at length. There is but one point to which it is needful to refer. Great stress is laid, in cases of this kind, on inadequacy of consideration where there is a considerable disproportion between the price paid and the real value of the property. (*Russell* v. *Southard*, 12 How. 139, 148.) There is testimony on both sides, on the question of disproportion, in this case. But the preponderance is very large on the part of Davis, that the share of Coyle in the property was sold for about its sale value, in view of its condition. There was a poorly built and poorly arranged building on the premises, which was incapable of actual partition; the law did not permit a partition by a sale *in invitum*, and Coyle's interest was a minority interest. These considerations made it difficult of sale at all."—*Per* Blatchford, J.

RUSSELL *v.* SOUTHARD

Supreme Court of the United States, 1851

(12 *How.* 139)

This was an appeal from the Circuit Court of the United States for the District of Kentucky, sitting as a court of equity.

It was a bill filed by Russell, the appellant, to redeem what he called a mortgage, and the question in the case was whether it was a mortgage or conditional sale. The facts are set forth in the opinion of the court. Upon the trial the Circuit Court dismissed the bill, and Russell appealed to this court.

Mr. Justice Curtis delivered the opinion of the court.[1]

This is a suit in equity to redeem a mortgage, brought here by appeal from the Circuit Court of the United States for the District of Kentucky.

[1] Portions of the opinion have been omitted.

agreement, and asked me to witness the same, which I did. My understanding of the contract was both from Southard and Russell, and my distinct impression is, that Russell was to pay the money in four months, and take back the farm." The intelligence and accuracy, as well as the fairness of this witness, are not controverted; and if he is believed, the transaction was a loan of money, upon the security of his farm. It is the opinion of the court that such was the real transaction. The amount and nature of what was advanced, compared with the value of the farm, the testimony of Wood as to the offer of Southard to make an advance of money on the farm, and his subsequent declaration that he had done so, and the information given by both parties to Doctor Johnston, that Russell was to pay the money at the end of four months, present a case of a loan on security, and are not overcome by the answer of Southard and the written memorandum.

It is true, Daniel R. Southard, answering, as he declares, from personal knowledge, sets out, with great minuteness, a case of an absolute and unconditional sale; the written contract by his brother to reconvey being, as he says, a mere gratuity conferred on Russell the next day, or the next but one, after this absolute sale and conveyance had been fully completed. But this account of the transaction is so completely overthrown by the proofs, that it was properly abandoned by the defendants' counsel, as not maintainable. We entertain grave doubts whether, after relying on an absolute sale in his answer, it is open to him to set up in defence a conditional sale; but it cannot be doubted, that the least effect justly attributable to such a departure from the facts, is to deprive his answer of all weight, as evidence, on this part of the case.

In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point, as to make it apparent that the draftsman considered he had a somewhat difficult task to perform. But it is not to be forgotten, that the same language which truly describes a real sale, may also be employed to cut off the right of redemption, in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that, in doubtful cases, the court leans to the conclusion that the reality was a mortgage, and not a sale. (*Conway* v. *Alexander*, 7 Cranch, 218; *Flagg* v. *Mann*, 2 Summer, 533; *Secrest* v. *Turner*, 2 J. J. Marsh. 471; *Edrington* v. *Harper*, 3 J. J. Marsh. 354; *Crane* v. *Bonnell*, 1 Green, Ch. R. 264; *Robertson* v.

Campbell, 2 Call. 421; *Poindexter* v. *McCannon*, 1 Dev. Eq. Cas. 373.)

It is true, Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties. "Necessitous men," says the Lord Chancellor, in *Vernon* v. *Bethell*, 2 Eden, 113, "are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them."

The memorandum does not contain any promise by Russell to repay the money, and no personal security was taken; but it is settled that this circumstance does not make the conveyance less effectual as a mortgage. (*Floyer* v. *Lavington*, 1 P. Wms. 268; *Lawley* v. *Hooper*, 3 Atk. 278; *Scott* v. *Fields*, 7 Watts, 360; *Flagg* v. *Mann*, 2 Sumner, 533; *Ancaster* v. *Mayer*, 1 Bro. C. C. 454.) And consequently it is not only entirely consistent with the conclusion that a mortgage was intended, but in a case where it was the design of one of the parties to clothe the transaction with the forms of a sale, in order to cut off the right of redemption, it is not to be expected that the party would, by taking personal security, effectually defeat his own attempt to avoid the appearance of a loan.

It has been made a question, indeed, whether the absence of the personal liability of the grantor to repay the money, be a conclusive test to determine whether the conveyance was a mortgage. In *Brown* v. *Dewey*, 1 Sandf. Ch. R. 57, the cases are reviewed and the result arrived at, that it is not conclusive. It has also been maintained that the proviso, or condition, if not restrained by words showing that the grantor had an option to pay or not, might constitute the grantee a creditor. (*Ancaster* v. *Mayer*, 1 Bro. C. C. 464; 2 Greenl. Cruise, 82 n, 3.) But we do not think it necessary to determine either of these questions; because we are of opinion that in this case there is sufficient evidence that the relation of debtor and creditor was actually created, and that the written memorandum ascertains the amount of the debt, though it contains no promise to pay it. In such a case it is settled, that an action of assumpsit will lie. (*Tilson* v. *Warwick Gas-Light Co.*, 4 B. & C. 968; *Yates* v. *Aston*, 4 Ad. & El. N. S. 182; *Burnett* v. *Lynch*, 5 B. & C. 589; *Elder* v. *Rouse*, 15 Wend. 218). . . .

parties would be defeated. This is, therefore, a case where the court should lean to hold the transaction to constitute a mortgage, thus giving what was clearly intended, the right of redemption.

There was nothing said about a repurchase or a resale, or a reassignment, but the right to redeem was expressly stipulated. The language used shows that the parties intended that the policy should be held as security for the premiums paid. Such a construction is at least as admissible as any other, and hence the court did not err in directing a verdict for the plaintiff.

I have treated the transaction as a mortgage, but it is unimportant to determine whether it was a mortgage or a pledge, as the same course of reasoning would apply and the same consequences would follow, whether it was one or the other. The judgment must therefore be affirmed.

All concur.

Judgment affirmed.[1]

MORTON *v.* ALLEN

SUPREME COURT OF ALABAMA, 1912

(180 *Ala.* 279)

BILL by Frank Allen against William Morton to declare a deed absolute on its face a mortgage and to redeem. From a decree for complainant respondent appeals. Affirmed.

DE GRAFFENRIED, J. The bill of complaint in this case was filed by Frank Allen against William Morton for the purpose of having a conveyance which is absolute on its face, and which was made by Frank Allen to William Morton on September 6, 1910, declared to be a mortgage, and to redeem. The deed conveys certain real estate situate at or near Boyles in Jefferson County. It recites a cash consideration of $6.25 and the assumption by

[1] See also, valuable opinion of STORY, J., in *Flagg* v. *Mann*, 2 Sumn. 486 (1837): "It has been said, that the true test, whether the conveyance in this case was a mortgage or not, is to ascertain whether it was a security for the payment of any money or not. I agree to that; and indeed, in all cases the true test, whether a mortgage or not, is to ascertain whether the conveyance is a security for the performance or non-performance of any act or thing. If the transaction resolve itself into a security, whatever may be its form, it is in equity a mortgage. If it be not a security then it may be a conditional or an absolute purchase."

the grantee, Morton, of a mortgage indebtedness then existing upon the property of $905. Frank Allen was residing upon the property, which consisted of something less than three acres, when the conveyance was made, and continued to reside there, occupying it as his home, until this bill was filed.

The deed is not what, on its face, it purports to be. As a part of the transaction which culminated in the execution of the deed, William Morton executed and delivered to Frank Allen what is termed a "lease sale contract," whereby Morton agreed to lease the property to Allen for a period of 52 months in consideration of $6.25 in cash paid by said Allen to Morton and the further sum of $1,029, "divided into fifty-two monthly payments of twenty dollars each for the first fifty-one payments, same being evidenced by fifty-one waive notes payable, the first one October 15, 1910, and each successive month thereafter until December 15, 1914, and one payment of nine dollars due by note January 15, 1915." In this "lease contract" there is a provision that "at the end of the term if the party of the second part (Frank Allen) has complied with each and all the conditions of this lease, then the party of the first part (William Morton) agrees that the rent paid under this lease shall be considered a payment for said property and the party of the first part shall make and execute a deed conveying said property to the party of the second part." There is also in this same "lease contract" a further provision that, if Frank Allen should fail to comply with the terms of the lease contract as to the payment of the "rent" notes as they matured, and should become as much as two months in arrears during the first year of the existence of the lease, or as much as three months in arrears in such payments at any time thereafter, or should fail to pay the taxes on said property as it became due, etc., then all the money paid on the contract should be held as rent for said property, and the right of Frank Allen to a conveyance of the property should be at an end. We therefore have what purports—so far as the face of the deed is concerned—to be an absolute conveyance by Frank Allen of the land to William Morton, but what is not an absolute deed, but a deed, which is either a conditional conveyance or a mortgage to secure a debt.

Frank Allen claims that the deed and lease sale contract was, in reality, a mortgage to secure an indebtedness of $905 and the interest thereon. William Morton claims that the transaction amounted to a conditional sale of the property, and that it was so understood between him and Frank Allen when the papers were

plaintiff an instrument in the form of a bill of sale which purported, for the express consideration of one dollar and other valuable considerations, to transfer to the plaintiff the safe and office furniture. As a part of the transaction said White executed a similar instrument to the plaintiff for the expressed consideration of $400 by which she transferred to the plaintiff certain household furniture. As a part of the transaction White borrowed of the plaintiff $700 and gave to him a series of promissory notes dated April 15, 1910, on most of which was indorsed "Bill of Sale, dated April 15, 1910, on household goods and office furniture to secure payment of within note." The bills of sale were in fact given as collateral security for the payment of said notes and each of them. On April 29 the bill of sale from Fleming to plaintiff was by the plaintiff filed in the office of the clerk of the city of Oneonta, in which city the parties resided. Some time thereafter White exchanged the safe in question for another safe, and the purchaser of the safe in question on the exchange of property sold the same to a person who subsequently sold such safe to the defendants in this action who have the possession thereof. There is default in the payment of a part of the amount of said loan. Before this action was commenced the plaintiff demanded the possession of said safe from the defendants and it was refused.

All of the questions of fact affecting the issues have been passed upon by a jury adversely to the defendants, and there is some evidence on which to base the findings of the jury upon each of the questions submitted to it. There is a question of law presented for our consideration, and that question is whether when a bill of sale absolute on its face, but in fact intended to operate as a mortgage of goods and chattels is filed pursuant to the provisions of article 10 of the Lien Law, it is notice to a subsequent purchaser in good faith, although there is nothing in the instrument itself expressing such intention and there is not filed therewith any other or further paper showing that the sale was intended to operate as a mortgage of goods and chattels.

We think the question is answered by the express language of the statute. It is provided by section 230 of the Lien Law (Cons. Laws, ch. 33) that "Every mortgage or *conveyance intended to operate as a mortgage of goods and chattels* . . . which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless

the mortgage, or a true copy thereof, is filed as directed in this article."

The city clerk of the city of Oneonta placed the instrument in question on file and indorsed thereon the time of its receipt, and the record book kept in the office of said clerk shows that it was so filed April 29, 1910, 4 P. M. Within thirty days next preceding the expiration of one year from the time of filing the same the plaintiff filed a renewal of the instrument, describing it and calling it a chattel mortgage, and asserting in such renewal that there remained unpaid of the amount secured by said mortgage the sum of $400 and interest thereon from a day specified.

The statutes do not provide for filing an instrument intended as an absolute transfer of personal property, but require in immediate delivery of the property followed by actual and continued change of possession to avoid a presumption of fraud. (Personal Property Law [Cons. Laws, ch. 41], § 36.) The intention of the statute first quoted is clear, and a reference to some of the decisions of our courts will show that a conveyance intended to operate as a mortgage of goods and chattels has at all times been treated under that statute the same as a chattel mortgage.

The right to redeem is the essential characteristic of a mortgage, and a bill of sale of chattels with a separate defeasance is as clearly a mortgage as if the defeasance formed a part of the bill of sale. (*Mooney* v. *Byrne*, 163 N. Y. 86, 92; *Brown* v. *Bement*, 8 Johns. 96; Jones on Chattel Mortgages, § 19.) An agreement to sell the same property, for the same price, made at the same time, and between the same parties, is a defeasance. (*Dickinson* v. *Oliver*, 195 N. Y. 238, 246.)

A bill of sale absolute on its face transferring property to be held as security for the payment of a debt due the vendee is in character and effect a mortgage and is to be treated as such. (*Smith* v. *Beattie*, 31 N. Y. 542; *Woodworth* v. *Hodgson*, 56 Hun, 236; *Kings County Bank* v. *Courtney*, 69 Hun, 152; *Susman* v. *Whyard*, 149 N. Y. 127; *Dickinson* v. *Oliver*, 96 App. Div. 65; S. C., 195 N. Y. 238, affirming 127 App. Div. 932; *Sloan* v. *National Surety Co.*, 74 App. Div. 417.) And this is true, not only as between the parties to the transaction, but also as to third parties who are affected with notice. (5 Ruling Case Law, 388.) It may be shown by parol. (*Despard* v. *Walbridge*, 15 N. Y. 374; *Horn* v. *Keteltas*, 46 N. Y. 605; *Barry* v. *Colville*, 129 N. Y. 302.) The intention may be manifested by the instrument itself, or by a written instrument of defeasance executed simultaneously with the con-

Had the plaintiff continued in possession any time after the execution of the deeds, I should have been clear that it was a mortgage; but she was not. And her long acquiescence under the defendant's possession is, to me, a strong evidence that it was to be an absolute conveyance; otherwise, the length of time would not have signified: for, they who take a conveyance of an estate as a mortgage, without any defeazance, are guilty of a fraud; and no length of time will bar a fraud. Besides, here the bill was filed in 1726. And though the cause has lain dormant; yet it is not like making an entry and then lying still; for, in the present case, the defendant might have dismissed the bill for want of prosecution, or they themselves might have set down the plea to be argued.

In the Northern parts it is the custom in drawing mortgages to make an absolute deed, with a defeazance separate from it; but I think it a wrong way; and, to me, it will always appear with a face of fraud: for, the defeazance may be lost; and then an absolute conveyance is set up. I would discourage the practice as much as possible.[1]

Upon the circumstances of the case, affirmed the decree, &c.

KELLERAN *v.* BROWN

Supreme Judicial Court of Massachusetts, 1808

(4 *Mass.* 443)

This was a writ of entry, and upon the general issue pleaded was tried before Thatcher, J., September term, 1806, when a verdict was rendered for the defendant.

In support of the action, the demandant read in evidence a deed of Timothy Manly conveying the land demanded to the demandant in fee.

The tenant, in defence of the action, having prayed in aid the title of Timothy Manly, under whom he claims the premises as

[1] "So where an absolute conveyance is made for such a sum of money, and the person to whom it was made, instead of entering and receiving the profits, demands interest for his money and has it paid him, this will be admitted to explain the nature of the conveyance."—*Per* Lord Ch. Nottingham, in *Maxwell* v. *Lady Mountacute*, Finch, Pre. Ch. 526 (1719).

"Suppose a person who advances money should, after he has executed the absolute conveyance, refuse to execute the defeazance, will not this court relieve against such fraud?"—*Per* Lord Ch. Hardwicke, in *Walker* v. *Walker*, 2 Atk. 98 (1740).

his tenant, the counsel for the tenant, to show the demandant ought not to have judgment, except as in an action upon a mortgage, offered to read in evidence an agreement in writing signed by the demandant, and bearing even date with the deed aforesaid, in the following terms, viz.: "Thomaston, May 26, 1800. I, Edward Kelleran, the subscriber, having purchased of Timothy Manly a lot of land lying in said Thomaston, containing fifty acres (being the lot which the said Manly purchased of Ebenezer Bly) for which I have received a warranty deed; but if the said Manly shall repay me the sum of four hundred dollars, with the lawful interest on the same in one year from the date hereof, I then will reconvey the said lot of land to him. Edward Kelleran;" and also offered to prove to the jury that the tenant, Brown, at the time of the commencement of this action, and for a long time before, was, and ever since has been, tenant at will of the premises demanded, under the said Timothy Manly, the aid of whose title is prayed in this action.

The demandant's counsel objecting, the judge rejected said agreement and evidence, as inadmissible. To which opinion of the judge the counsel for the tenant excepted, as erroneous; whereupon the cause stood continued for the opinion of the Court upon the said exceptions.

At last June term in this county, the cause was briefly spoken to by *Mellen* in support of the exceptions, and thence continued for advisement, and now the opinion of the Court was delivered by

Parsons, C. J. The demandant has sued a writ of entry, to recover his seisin of the lands demanded in his writ and count. The tenant pleads the general issue, and to maintain the issue on his part, offers to give in evidence that he is the tenant at will to one Timothy Manly; and that Manly conveyed the lands demanded to Kelleran in mortgage. To prove that the conveyance was a mortgage, he offered to read in evidence a contract in writing, under the demandant's hand, of the following tenor: (Here his honor read the agreement before recited.) But the judge rejected the evidence that he was tenant at will, and refused to let this contract be read to the jury.

As the demandant, in his writ, had demanded a freehold of the tenant, he, by pleading the general issue, had admitted on record that he was the tenant of the freehold. He was, therefore, estopped from proving that he had not the freehold but was a tenant at will.

up by explicit testimony to this effect. The inhabitancy of Lucy Darling, *prima facie*, with property sufficient to purchase a farm of the value of 800 dollars, was a benefit to the plaintiffs, and not a prejudice; and all our towns would be pleased in this manner to extend their population.

It will be observed that the question before us is not what a court of chancery may do, in the exercise of its peculiar jurisdiction, but what is the established rule of a court of law. It has been often decided in chancery that parol evidence is admissible to shew that an absolute deed was intended as a mortgage, and that a defeasance was omitted through fraud or mistake. Hence, a deed absolute on the face of it, and though registered as a deed, will in chancery be held valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, although the defeasance was by an agreement resting in parol (*Washburn* v. *Merrills*, 1 Day, 139, 1 Pow. Mort. 200; *Strong & al.* v. *Stewart*, 4 Johns. Chan. Rep. 167; *James* v. *Johnson & al.*, 6 Johns. Chan. Rep. 417; *Maxwell* v. *Lady Mountacute*, Prec. in Chan. 526; *Dixon* v. *Parker*, 2 Ves. 225; *Marks & al.* v. *Pell*, 1 Johns. Chan. Rep. 594; *Clark* v. *Henry*, 2 Cowen, 324; *Slee* v. *Manhattan Company*, 1 Paige, 48). But these decisions are altogether in support of the determination of the judge in this case. Chancery interposes because a court of law does not afford a remedy. The rule in the courts of law is that the written instrument, in contemplation of law, contains the true agreement of the parties, and that the writing furnishes better evidence of their intention than any that can be supplied by parol. But in equity, relief may be had against any deed or contract in writing founded in mistake or fraud (1 Madd. Chan. 41; *Moses* v. *Murgatroyd*, 1 Johns. Chan. Rep. 128; *Marks & al.* v. *Pell*, 1 Johns. Chan. Rep. 594; *Gillespie & ux.* v. *Moon*, 2 Johns. Chan. Rep. 585; *Noble* v. *Comstock*, 3 Conn. Rep. 295).

On the whole, it is incontrovertibly clear that the decision complained of is correct, and that a new trial must be denied.

Peters, Williams and Bissell, JJ., were of the same opinion.

Daggett, J., having been of counsel in the cause, gave no opinion.

New trial not to be granted.[1]

[1] *McClane* v. *White*, 5 Minn. 178 (1861); *Gates* v. *Sutherland*, 76 Mich. 231 (1889), *accord.*

SWART *v.* SERVICE

SUPREME COURT OF NEW YORK, 1839

(21 *Wend.* 36)

THIS was an action of ejectment, tried at the Saratoga circuit in May, 1837, before the Hon. John Willard, one of the circuit judges.

The plaintiffs, the children of James Swart, deceased, who was the only child and heir at law of Derick Swart, showed title by *lease and release*, bearing date 24th and 25th September, 1784, executed by John Cuerdon to Derick Swart, conveying 68 acres of land, the premises in question: which instruments of lease and release were duly acknowledged by Cuerdon on the *sixth* day of *April*, 1804. Cuerdon, the releasor of the premises, died in possession of the premises eight or nine years before the trial, having occupied them since the date of the lease and release. The defendant was in possession of the premises at the commencement of the suit. He offered to prove that the *lease and release* was in fact given as a *mortgage* for the security of a debt due from Cuerdon to Swart, and that the debt was paid by Cuerdon to Swart many years before his death: this evidence was objected to, unless the defendant would connect himself with Cuerdon, and the objection was sustained by the circuit judge. The defendant then requested the judge to charge that the evidence established an *adverse possession* in Cuerdon. The judge refused so to charge, and directed a verdict for the plaintiffs, and the jury found accordingly. The defendant now moved for a new trial on the two grounds raised at the circuit, and on the additional ground, that from lapse of time, *payment* of the mortgage might be presumed. . . .

By the Court: COWEN, J. The first offer made by the defendant had no dependence on privity of title between him and Cuerdon. It was a simple offer to prove an outstanding title, by turning the conveyance by lease and release into a mortgage, and shewing its extinction by payment. That would divest the title of Swart and of his grandchildren, the plaintiffs; for payment extinguishes a mortgage at law as well as in equity (*Jackson, ex dem. Rosevelt*, v. *Stackhouse*, 1 Cowen, 122). But independent of that, if Swart were a mere mortgagee, neither he nor those claiming under him could recover (2 R. S. 237, § 37, 2d ed., *Jackson, ex dem. Titus*, v. *Myers*,

Henry, the point was directly before the Court, we think that the plaintiff's recovery in this case ought to be sustained.

RUGGLES, Ch. J., and GARDINER, JEWETT and MORSE, JJ., concurred with JUDGE JOHNSON in favor of affirming the judgment.

WILLARD,[1] TAGGART and MASON, JJ., were for its reversal.

Judgment affirmed.

DESPARD *v.* WALBRIDGE

COURT OF APPEALS OF NEW YORK, 1857

(15 *N. Y.* 374)

THIS action was brought to recover for the use and occupation of a store, in Buffalo, by the defendant, from May 1st, 1851, to August 1st, 1851, which the complaint averred to be worth $375. It also averred that the defendant on May 1st, 1851, agreed to pay for such use and occupation $1500 per annum, payable quarterly. The action was tried before a referee, who found the following facts: On the 8th of March, 1850, one Sherwood demised to H. B. Ritchie the store above mentioned, and another adjoining, for two years from the first of May then next, with a right of renewal on certain conditions, Ritchie convenanting to pay a certain rent. On the 17th of November, 1850, Ritchie assigned this lease and his title to the term thereby granted to the plaintiff. At the time of such assignment the defendant was in possession of the premises as a subtenant of Ritchie, under a lease executed April 30th, 1850, for the term of one year from May 1st, 1850.

Sherwood, the original lessor, on the 9th of October, 1850, assigned his interest in the lease executed by Ritchie to Robert Codd for the purpose of securing a debt which he owed to Codd. On the 19th of November, 1850, Ritchie assigned to Codd all his interest as landlord in the sub-lease executed between himself and the defendant. The defendant occupied the premises under the lease from Ritchie, and after the assignment thereof to Codd paid the rent to the latter. On the 1st day of May, 1851, the plaintiff served on the defendant a written notice that he was the assignee of Ritchie's term, and that in case the defendant held over beyond his term, then at the point of expiring, the plaintiff would consider the premises as held and taken by defendant for the term of one

[1] The dissenting opinion of WILLARD, J., is omitted. It followed *Webb* v. *Rice*, 6 Hill (N. Y.), 219 (1843).

year from May 1st, 1851, at the annual rent of $1500, payable quarterly.

The plaintiff, having proved these facts, rested his case, and the defendant moved for a non-suit, which being refused by the referee, he took an exception. Other exceptions were taken upon the trial, and to the referee's report, which, with the facts relating thereto, sufficiently appear in the opinion of the court. The referee reported that the defendant occupied under an implied agreement to pay what the occupation of the premises was reasonably worth, which he found to be at the rate of $1200 per annum. Judgment was entered upon his report, which was affirmed by the Supreme Court at general term, and the defendant appealed.

SELDEN, J.[1] . . . The principal question is that which arises upon the exception stated in the referee's report. It is set forth in the answer, in substance, that the assignment of the Sherwood lease from Ritchie to the plaintiff was made at the request and for the benefit of Codd, and for the sole purpose of aiding the latter in the collection of his debt against Sherwood. It is also stated that this debt had been fully paid before May 1st, 1851, by Hiram E. Howard, who had succeeded to the rights of Sherwood in the premises, and that Ritchie, on the 1st of May, 1851, surrendered all his rights in the premises to Howard, whose tenant the defendant then became. These facts the defendant offered to prove and his offer was rejected. . . .

But it is urged that the proof offered was properly excluded for another reason. The assignment to the plaintiff being absolute in its terms, it is said that parol evidence was inadmissible to show that it was intended as security merely; and the case of *Webb* v. *Rice*, 6 Hill, 219, is cited in support of this position. It was held in that case that in an action at law parol evidence could not be received to show that a deed, absolute upon its face, was intended as a mortgage. It was conceded, however, that the rule was settled otherwise in equity. In the case of *Hodges* v. *The Tennessee Insurance Company*, 4 Seld. 416, this court held that the rule in equity continued the same since the case of *Webb* v. *Rice* as before. The only question, therefore, upon this subject is whether the equity rule is applicable to the present case, which is a purely legal action. As, however, since the enactment of the Code of Procedure a defendant may avail himself of an equitable as well as a legal defense in all cases, whatever may be the nature of the

[1] Portions of the opinion are omitted.

of equity, that one, who has induced another to act upon the supposition that a writing had been or would be given, shall not take advantage of that act, and escape responsibility himself, by pleading the statute of frauds on account of the absence of such writing, which has been caused by his own fault. Besides the cases cited in *Glass* v. *Hulbert*, 102 Mass. 24, see *Bartlett* v. *Pickersgill*, 1 Eden, 515; *s. c.* 1 Cox Ch. 15; Browne on St. of Frauds, § 94. But this principle will not help the plaintiff here, because he does not allege that any defeasance was intended or expected; and it is found by the report that the deed "was executed by the plaintiff intelligently, and not by accident or mistake, and that no fraud was practised to procure its execution, other than may be inferred" from the facts stated.

From those facts, and from the bill and answer, we think these points must be taken to be established, to wit, 1st, that the plaintiff had purchased the parcel of land in controversy and held a contract from Tirrill for its conveyance to himself upon payment of the sum of $5500; 2d, that the money was paid to Tirrill, and the land conveyed by Tirrill to the plaintiff, in fulfilment of that contract; 3d, that the money was advanced by the defendant to the plaintiff as a loan, and the deed from the plaintiff to the defendant was given by way of security therefor. The report finds, "from all the circumstances surrounding the transaction, and from the acts and declarations of the parties at the time, that the plaintiff believed and had reason to believe" this to be the case.

The defendant, in his answer, does not pretend that he ever made any contract, either with Tirrill or the plaintiff, by which a price was agreed upon to be paid by him as and for the purchase of the premises for himself. His only allegation to this point is, at most, indirect and equivocal. He denies that said estate was purchased of Tirrill for the plaintiff's benefit, "neither did this defendant agree to purchase it for the benefit of the plaintiff, but for the use and benefit of the defendant." This is followed by an argumentative assertion of equitable title acquired as a resulting trust from payment of the purchase money, and that the deed from the plaintiff was given "for the purpose of vesting both the legal and equitable title in the defendant." He does allege that he "agreed to pay Tirrill the said sum of $5500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name." He alleges, with sufficient fulness and minuteness, that he refused to make a loan of the money to the plaintiff both "before and at the time of said payment to said Tirrill," and

refused "to allow the plaintiff to have any interest in said money, or the premises purchased therewith," and that it was agreed that the premises should be conveyed in fee simple to the defendant, "and the plaintiff should not have any interest or title thereto." He further avers "that, before the plaintiff signed and executed his deed to this defendant, said deed was read in the presence and hearing of the plaintiff, and he was then and there informed that the same was an absolute conveyance, and that he ceased thereby to have any interest whatever therein." Taking the facts to be literally as thus alleged, they significantly suggest the inference that the money was advanced by the defendant for the accommodation of the plaintiff in his purchase of the land, and the deed given to the defendant for his security therefor; but that it was agreed between them that the plaintiff should retain no legal right of redemption. He was to trust himself wholly to the good faith and forbearance of the defendant.

It is alleged in the bill, and not denied in the answer, that the land has been all the time in the occupation of the plaintiff. We think it is also to be inferred that the land is of considerably greater value than the sum advanced by the defendant.

From the whole case we are satisfied that it was a transaction between borrower and lender, and not a real purchase of the land by the defendant. We are brought, then, to the question, Can equity relieve in such a case?

The decisions in the courts of the United States, and the opinions declared by its judges, are uniform in favor of the existence of the power, and the propriety of its exercise by a court of chancery (*Hughes* v. *Edwards*, 9 Wheat. 489; *Sprigg* v. *Bank of Mount Pleasant*, 14 Pet. 201, 208; *Morris* v. *Nixon*, 1 How. 118; *Russell* v. *Southard*, 12 How. 139; *Taylor* v. *Luther*, 2 Sumner, 228; *Flagg* v. *Mann*, *id.* 486; *Jenkins* v. *Eldredge*, 3 Story, 181; *Bentley* v. *Phelps*, 2 Woodb. & Min. 426; *Wyman* v. *Babcock*, 2 Curtis C. C. 386, 398; *s. c.* 19 How. 289). Although not bound by the authority of the courts of the United States, in a matter of this sort, still we deem it to be important that uniformity of interpretation and administration of both law and equity should prevail in the state and federal courts. We are disposed therefore to yield much deference to the decisions above referred to, and to follow them, unless we can see that they are not supported by sound principles of jurisprudence, or that they conflict with rules of law already settled by the decisions of our own courts.

We cannot concur in the doctrine advanced in some of the cases,

245, 246); and in connection with other evidence may afford strong ground of inference that the transaction purporting to be a sale was not fairly and in reality so (Kerr on Fraud and Mistake, 186 and note; *Wharf* v. *Howell*, 5 Binn. 499).

Another circumstance, that may and ought to have much weight, is the continuance of the grantor in the use and occupation of the land as owner, after the apparent sale and conveyance (*Cotterell* v. *Purchase*, Cas. temp. Talbot, 61; *Lincoln* v. *Wright*, 4 De Gex & Jones, 16). These several considerations have more or less weight, according to the circumstances of each case (*Conway* v. *Alexander*, 7 Cranch, 218; *Bentley* v. *Phelps*, 2 Woodb. & Min. 426). It is not necessary that all should concur to the same result in any case. Each case must be determined upon its own special facts; but those should be of clear and decisive import.

In the present case, we are able to arrive at the clear and satisfactory conclusion that there was no real purchase of the land by the defendant, either from Tirrill or from the plaintiff; that his advance of the purchase money at the request of the plaintiff created a debt upon an implied assumpsit, if there was no express promise; and that it was the expectation of both parties that the money would be repaid soon and the land reconveyed. Whatever may have been the intention of the defendant, he must have known that this was the expectation of the plaintiff; and it is most favorable to him to suppose that it was his own expectation also. These conclusions are not in the least modified in his favor by an examination of his answer.

We must declare therefore that in equity he holds the title subject to redemption by the plaintiff in such manner and upon such terms as shall be determined upon a hearing therefor before a single justice.

Decree accordingly.[1]

[1] See also, *Horn* v. *Keteltas*, 46 N. Y. 605 (1871); *Oberdorfer* v. *White*, 25 Ky. L. Rep. 1629, 78 S. W. 436 (1904); *Cullen* v. *Carey*, 146 Mass. 50 (1888); *Reich* v. *Cochran*, 213 N. Y. 416 (1914).

The view that fraud, mistake or undue influence must be shown, once general, has been for the most part abandoned. See, for example, *Brainerd* v. *Brainerd*, 15 Conn. 575 (1843) and *French* v. *Burns*, 35 Conn. 359 (1868). It survives, however, in a few States (*Norris* v. *McLam*, 104 N. C. 159 [1889]; Ga. Code, 1895, § 2725; Miss. Ann. Code, § 4233), and its influence may be traced in many others (*Stutphen* v. *Cushman*, 35 Ill. 186 [1864]; *Stinchfield* v. *Milliken*, 71 Me. 567 [1880]; *Russell* v. *Southard*, 12 How. 139, 147–8 [1851]).

"It will be perceived that in none of these cases did the court attempt to range the jurisdiction to turn an absolute deed into a mortgage, by parol evidence, under any specific

N. H. GEN. LAWS, c. 136. § 1. Every conveyance of lands, made for the purpose of securing the payment of money, or the performance of any other thing in the condition thereof stated, is a mortgage within the meaning of this chapter.

§ 2. No conveyance in writing of any lands shall be defeated, nor any estate encumbered by any agreement, unless it is inserted in the condition of the conveyance and made part thereof, stating the sum of money to be secured or other thing to be performed. (N. H. Public Statutes, 1901, Ch. 139, secs. 1–2.)

PENN. LAWS, 1881, No. 91. § 1. Be it enacted, &c., That no defeasance to any deed for real estate, regular and absolute upon its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made and is in writing, signed, sealed, acknowledged and delivered by the grantee in the deed to the grantor, and is recorded in the office for the recording of deeds and mortgages in the county wherein the said lands are situated, within sixty days from the execution thereof; and such defeasances shall be recorded and indexed by the recorder.—Approved the 8th day of June, A. D. 1881.

head of equity, such as fraud, accident or mistake; but the rule seems to have grown into recognition as an independent head of equity. Still it must have its foundation in this, that where the transaction is shown to have been meant as a security for a loan, the deed will have the character of a mortgage, without other proof of fraud than is implied in showing that a conveyance, taken for the mutual benefit of both parties, has been appropriated solely to the use of the grantee. For when we seek in the standard authorities for the ground or principle upon which the doctrine of the admissibility of parol evidence originally rested, it will be found in the old and familiar heads of equity, such as fraud, accident, mistake or trust. Chancellor Kent, 4 Com. 143, states the doctrine thus: 'A deed, absolute on the face of it, and though registered as a deed, will be valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, and this would be the case, though the defeasance was by an agreement resting in parol, for parol evidence is admissible in equity to show that an absolute deed was intended as a mortgage, *and that the defeasance has been omitted or destroyed by fraud, surprise, or mistake.*' Story, speaking of the same subject, says: 'Even parol evidence is admissible in *some* cases, as in cases of *fraud, accident, and mistake,* to show that a conveyance, absolute on its face, was intended between the parties to be a mere mortgage or security for money' (2 Eq. Jur., § 1018, note 2)."—*Per* MCALLISTER, J., in *Ruckman* v. *Alwood*, 71 Ill. 155 (1873).

to its benefits has been long dead, and it does not appear that she left any representative capable of enforcing any of its stipulations which were not performed at her death. Moreover, this suit was not brought to recover such interest. But the plaintiff survives, and is entitled to the settlement attempted to be made in her favor, provided it was legally valid when made, and provided her rights have not been lost by lapse of time.[1]

1. Where the rights of creditors do not stand in the way, and there appear not to have been any in this case, it is perfectly lawful for a parent to make such provision out of his estate for a child or children, by present, gift or by testament, as he may think proper. There are cases in which a voluntary executory gift will not be enforced by the courts; but an executed one is as valid as though based on a full pecuniary consideration.

A mortgage is an executed conditional transfer of the real estate mortgaged. In judgment of law, any conveyance which would be sufficient to pass the title to a purchaser conveys it to the mortgagee. The instrument executed by William Bucklin to Vedder Green would be a perfect deed of bargain and sale but for the condition by which it was to become void upon performance of the agreement. It expresses a pecuniary consideration which, though nominal, is as adequate to waive a use as though it were the full value of the land, and though it may not have been paid, the defendant is estopped by his deed from denying its payment. By the Revised Statutes it is denominated a grant; but for all substantial purposes it has the effect of a deed of bargain and sale (1 R. S. 738, 739, §§ 137, 138, 142). At common law, and before the jurisdiction of courts of equity to relieve against forfeitures had been established, this deed would have vested in the trustee an estate in fee simple defeasible only by the performance of the conditions. This is, of course, a technical view of the nature of a mortgage.

By applying to the transaction the equitable doctrines of the courts of equity, now also recognized to a great extent by the courts of law and by modern statutes, the mortgage is simply a security for the payment of the money it was given to secure, and the mortgagor continues to own the land, while the mortgagee's interest is that of a creditor only.

But the defendants' position is formal also. They insist that

[1] The second portion of the opinion, dealing with the effect of the lapse of time, is omitted, the conclusion being reached that the Statute of Limitations was not a bar.

courts of equity will not decree the performance of a voluntary executory agreement even where the subject is a portion intended for a child or other relative, and authorities are referred to to sustain that position (*Duvoll* v. *Wilson*, 9 Barb. 487, and cases cited; but see *Souverbye* v. *Arden*, 1 Johns. Ch. 240, 266, and cases referred to by Chancellor Kent). If the settlement be an executed one, like a deed or mortgage, the doctrine relied on has no application. The title of the mortgaged premises is transferred by legal conveyance. The mortgagor retains an equity of redemption, equivalent, for many purposes, to a general ownership of the land, but yet, in point of form, an equity. The mortgagee may, it is true, come into a court of equity to enforce his mortgage, as the mortgagor must in order to redeem. The reason why a mortgagee must resort to equity is not because the mortgage is an executory transaction, and requires the aid of a court of chancery to compel a specific performance. On non-performance of the conditions the mortgage is forfeited at law, but the equity of redemption remains in the mortgagor or his representatives. No prospective language of the parties which can be written is strong enough to produce the forfeiture of that equity, which can only be extinguished by a decree, or an equivalent proceeding, under a positive statute. This rule is expressed by the phrase, "once a mortgage, always a mortgage." The mortgagee cannot destroy this equity except by a suit in chancery or a statute foreclosure. Formerly, he could bring ejectment to get possession of the estate, after forfeiture at law, but that is now forbidden by statute. Still if he can be got into possession without a breach of the peace, his title under the mortgage deed is strong enough in law to enable him to defend an ejectment brought by the mortgagee (*Mickles* v. *Dillaye*, 17 N. Y. 80; *Mickles* v. *Townsend*, 18 *id.* 575). The plaintiff brings her suit in equity, not for the purpose of being aided in establishing her mortgage under the notion of remedying a defective conveyance, or obtaining a specific performance, but to foreclose and extinguish the defendants' equity of redemption, which a court of law is not competent to deal with. She does not come to establish a voluntary equitable agreement, but to enforce a legal title under an executed conveyance, and to cut off an equity attached to that legal title and vested in the defendants.

I think, therefore, that the instrument contained a valid mortgage of the land described in it, and that it was an available security for the performance of the contract to purchase and convey lands

mother of the defendants, died, and the year following he married the plaintiff. He died in 1883, leaving a will, in which the plaintiff was named as executrix. In that capacity she brought actions against each of the sons to foreclose the mortgages given by them respectively. The complaint was dismissed in each case and the judgments were affirmed at General Term. There are two appeals and two records, but both judgments rest on precisely the same facts, and the questions involved in both appeals are identical. Both cases may, therefore, be conveniently considered and disposed of as one.

"The plaintiff's right to enforce the mortgage is the same and no other than the mortgagee, her husband and testator, had in his lifetime. She stands in the place of her husband, and cannot enforce the instrument unless he could, and every defense that the defendants could urge against the mortgage during the life of the father, they may interpose now against his personal representative. The instruments purport to have been given to secure the payment of money, but it was shown at the trial affirmatively, and found by the trial court, that no debt in fact existed in favor of the father against either of the sons; that there was no intention to give the mortgage on the one hand, or to hold it on the other, as security for any debt; that in fact there was no legal or equitable consideration moving between the parties and no intention on either side to treat the instruments as binding obligations or as valid or subsisting securities. The evidence upon which these findings were made, if competent, was sufficient and the fact is not open to question or review here.

"The findings are based upon the business relations which the parties occupied to each other before the father gave up the possession of the farm to the sons and then conveyed it to them, taking back the mortgages in question, and upon his subsequent conduct and declarations as to the character of the instruments and the purpose of their execution and delivery. The general principle that an instrument under seal, in the form of a mortgage upon real estate, which upon its face expresses a consideration and purports to have been given as security for a debt may, nevertheless, as between the parties, be shown to have been purely voluntary or without any consideration, and so invalid, is not denied (*Davis* v. *Bechstein*, 69 N. Y. 440; *Hill* v. *Hoole*, 116 *id.* 299; *Briggs* v. *Langford*, 107 *id.* 680; Thomas on Mort., § 847; Jones on Mort., § 1297).

"The point upon which the learned counsel for the plaintiff relies is that evidence was not admissible at the trial to wholly

contradict and defeat the instruments by showing, contrary to what appeared on their face, that they were intended to have no operation whatever. It is sought to distinguish this case from that of a deed, absolute upon its face, which may be shown to be in fact a mortgage, and from the numerous other cases in which equity permits a party to show that an instrument, appearing upon its face to be of one character, is or ought to be in truth of quite another character. It is said that the principle upon which these cases rest gives no sanction to what was held by the court below in this case, that a party may impeach his deed by showing, not only that it was without consideration, but that it was intended to have no validity or become of any binding force whatever.

"The desire on the part of the father to retain some sort of guardianship over the title to the farm which he had conveyed to the defendants was, perhaps, natural enough under the circumstances, and it is frequently shown in such transactions. That the mortgages were not intended to be held by him for any other purpose is supported by the circumstances that no bond was given, that they were not recorded, and no claim was made by the mortgagee during his life, a period of about nine years, that they were in his hands for any other purpose or for the payment of either principal or interest though past due. All the circumstances, when considered with the proof of the statements and declarations of the father, were sufficient to warrant the findings of the trial court with respect to the real purpose with which the instruments were made and their true consideration (*Holmes* v. *Roper*, 141 N. Y. 67; *Lyon* v. *Ricker*, *id.* 225). "The presumption of some consideration that arose from the presence of a seal was overthrown, and we must assume that the instruments were without consideration of any kind (*Gray* v. *Barton*, 55 N. Y. 68; *Best* v. *Thiel*, 79 id. 15; *Torry* v. *Black*, 58 *id.* 185; *Home Ins. Co.* v. *Watson*, 59 *id.* 395; *Dubois* v. *Hermance*, 56 *id.* 673).

"There is no reason that we can perceive for giving to these instruments any greater force or effect than was contemplated by the parties when they were executed and delivered. There is no estoppel or any right which attached in favor of third parties, and we are not aware of any principle which would now require a court of equity to treat these instruments as valid subsisting obligations unless they were intended as such when made, and this is negatived by the findings.

"Nor do we perceive any good reason why the real purpose and

for all her wants in a reasonable and proper way, will provide her with all needed food, drink and clothing, have a room and fire when needed, lodging and every necessary comfort, both in sickness and health, and at her decease give her decent and proper burial, and erect tombstones at her grave with a suitable inscription thereon, within one year after her decease, said tombstone to be of a value of not less than fourteen dollars. Now, therefore, if said Bostwick shall well and truly perform all and every of the above covenants and stipulations faithfully, then this deed to be void, otherwise to remain in full force and effect in law."

The complainant also alleges that the defendant, Bostwick, subsequently conveyed his interest in the premises to the defendant, Jones, and that Jones conveyed his interest to the other defendant, Bartholomew. The defendants demurred, and the case is reserved.

Whether the instrument sued on is or is not a mortgage is the principal question in the case. What is a mortgage? "A mortgage is a contract of sale executed, with power to redeem. . . . The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing any other act. The most common method is to insert the condition in the deed, but it may as well be done by a separate instrument of defeasance executed at the same time. . . . A bond or note is usually taken for the debt, which is described in the deed, with a condition that if the debt is paid by the time the deed shall be void. In such case the mortgage is called a collateral security for the debt. In like manner an engagement to indemnify, or any other agreement, may be described in the mortgage deed." 2 Swift's Digest, 182, 183. "To constitute a mortgage the conveyance must be made to secure the payment of a debt." *Bacon* v. *Brown*, 19 Conn. 29. "A conveyance of lands by a debtor to a creditor as a security for the payment of the debt." *Jarvis* v. *Woodruff*, 22 Conn. 548.

What is a debt? Amon Bostwick received $900 from the plaintiff, in consideration of which he agreed to support Sarah A. Bostwick during life, and at her death to bury her and to erect a tombstone to her memory. To secure the performance of this agreement he executed this deed, with a condition that the deed should be void if the agreement should be performed. He assumed a duty which may be aptly described as a debt. He executed a deed of real estate as collateral security for the performance of that duty—the payment of that debt. The obligation falls within an approved definition of debt, and the conveyance is within the legal definition of a mortgage.

There is no force in the objection that this cannot be a mortgage because of the difficulty in ascertaining the amount of the debt, as clearly appears by the definitions. Of course there is less certainty and more inconvenience in reducing an obligation of this nature to a money valuation than there is in computing the amount due on an ordinary bond or note. Nevertheless it may be approximately done; and this is sufficient for all the purposes of substantial justice. Courts never refuse to redress an injury on account of the difficulty in estimating the extent of the injury in dollars and cents.

In this case the age, health, general condition and expectation of life of Sarah A. Bostwick must be known; add to these the probable cost of supporting her for one year, and we have the data for a reasonable estimate of the cost of supporting her through life. It is a problem of the same nature, containing the same elements and similar factors, with the problem which the parties solved fourteen years ago. They then, as it seems, fixed the outside limit at $900. The same thing can be done now as well as then. Possibly $900 may be considered an equitable limit beyond which the plaintiff may not claim in this case. As other circumstances may exist which will materially affect the general question we will not consider the question further on this demurrer.

Regarding the conveyance as a mortgage, as we do, there is no foundation for the claim that an entry for a breach of the condition is essential. An entry is essential when the grantor would divest the grantee of his title for a breach of a condition. This is an action by the grantee, in whom the title is, not to enforce a forfeiture, but to foreclose an equity of redemption, unless the grantor, within a reasonable time allowed him therefor, pays the damage sustained by a breach of his agreement.

The Court of Common Pleas is advised to overrule the demurrer.[1]

[1] In *Henley* v. *Hotaling*, 41 Cal. 22 (1871), RHODES, C. J., said: "A mortgage is a security for the performance of an agreement, which is usually to pay a sum of money. Leaving out of view other agreements than those for the payment of money, *it is essential that there be an agreement, either express or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money. If there is no debt there is no mortgage.*"

Cf. Flagg v. *Mann*, 2 Sumn. 486 (1837), *per* STORY, J.

him? The Payment of the Money will not alter the Case in a Court of Equity; for, it ought not to have been paid: And the Maxim of *Volenti non fit Injuria* will hold as well in all Cases of hard Bargains, against which the Court relieves, as in this. It is only the Corruption of the Person making such Bargains that is to be considered: It is that only which the *Statute* has in View; and 'tis that only which intitles the Party oppressed to Relief. This answers the Objection that was made by the Defendant's Counsel, of the Bankrupts being *Participes Criminis;* for, they are oppressed, and their Necessities obliged them to submit to those Terms. Nor can it be said in any Case of Oppression, that the Party oppressed is *Particeps Criminis;* since it is that very Hardship which he labours under, and which is imposed on him by another, that makes the Crime. The case of Gamesters, to which this has been compared, is no way parallel; for, there both Parties are Criminal: And if two Persons will sit down, and endeavour to ruin one another, and one pays the Money, if after Payment he cannot recover it at Law, I do not see that a Court of Equity has anything to do but to stand *Neuter;* there being in that Case no Oppression upon one Party, as there is in this.[1] Another Difficulty was made as to the Refunding: But is not that a common Direction in all Cases where Securities are sought to be redeemed, that if the Party has been over-paid, he shall refund? Must he keep Money that he has no Right to, merely because he got it into his Hands? I do not determine how it would be if all the Securities were delivered up; that is not now before me: I only determine what is now before the Court; and is the common Direction in all Cases where Securities are sought to be redeemed.

And so affirmed the Decree, &c.

[1] "In cases where agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is, perhaps, *particeps criminis* is not in equity material. The reason is that the public interest requires that relief should be given, and it is given to the public through the party (Story, Eq., § 208)."—*Per* ENGLISH Ch. J., in *Breathwit* v. *Rogers*, 32 Ark. 758 (1878).

FANNING *v.* DUNHAM

Court of Chancery of New York, 1821

(5 *Johns. Ch.* 122)

Bill in equity. Plaintiff sought cancellation of a mortgage and also an injunction against the defendant from proceeding at law on the mortgage or selling under it. It appeared that defendant was about to foreclose the mortgage by virtue of a power of sale contained therein. Plaintiff claimed that the notes and mortgage were made and delivered upon usurious consideration. On this point a feigned issue was tried and the jury found in favor of plaintiff.[1]

The Chancellor [Kent]. If the defendant was endeavoring to enforce any of his securities in this Court, and the present plaintiff had set up and made out the usury, by way of defense, the remedy would have been obvious. The securities would have been declared void, and ordered to be delivered up and cancelled. But the defendant has not resorted to this Court. He has caused a judgment to be entered up at law, upon the warrant of attorney given by the plaintiff; and the Supreme Court have ultimately refused to afford any relief to the plaintiff against that judgment, though that Court awarded a feigned issue, and had the usury in the bond upon which the judgment was entered, established by the verdict of a jury. The defendant has also proceeded to foreclose the mortgage, not by the aid of this Court, but by advertising under a power contained in the mortgage, and it is the present plaintiff who is compelled to come here and ask for relief, which he cannot obtain elsewhere, against the judgment at law and other legal securities infected with usury, by means of the original transactions and responsibilities which they were intended to cover.

The question now is, upon what terms he can have relief?

With respect to the relief that can be afforded here, I take the rule to be, that a plaintiff who comes to a Court of Equity for relief against a judgment at law, or other legal security, on the ground of usury, cannot be relieved, except upon the reasonable terms of paying to the defendant what is really and *bona fide* due to him. On the other hand, if the party claiming under such usurious judgment, or other security, resorts to this Court to render his claim

[1] Statement of facts abridged. Portion of opinion omitted.

coming into that tribunal than the fact of usury. But the chancellor, in *Perrine* v. *Striker*, 7 Paige, 598, held, that where the party had a full and complete remedy at law, he could not come into the Court of Chancery for relief; that this statute was not intended "to compel the Court of Chancery to take jurisdiction of every question of usury, although a perfect remedy, both as to discovery and relief, could be had in a court of law." Hence, when the parties to a note not negotiable sought a discovery and perpetual injunction against a suit thereon (although the statute authorized the examination of the plaintiff in the suit at law on the trial) on the ground that it was usurious, the bill was dismissed because the remedy was complete at law. But here cognized the jurisdiction and the propriety of its exercise, when there were any special circumstances which made the remedy at law ineffectual or incomplete.

In *Morse* v. *Hovey*, 9 Paige, 197, on dismissing the bill, the chancellor affirms the decision in *Perrine* v. *Striker*, and expounds it more fully, thus: "The legislature did not intend to transfer to this court concurrent jurisdiction with courts of law in every case of a usurious contract; but merely to give to this court the power to exercise its jurisdiction in those cases where it was necessary to aid the defense of usury; or to remove *usurious securities which were a cloud upon the complainant's* title to real property, or which might be used at law to his injury in such a manner that he could not interpose a legal defense to a suit on them in a court of law. Here the note is *negotiable*, so that it may be sued in the name of a third person; and if the bill had contained the allegation that the usury could only be proved by the oath of the defendant, it might possibly have presented a case for the interference of this court."

Conceding that this relaxation of the stringent and imperative language of the statute is reasonable, no construction of the statute has gone further.

Accordingly, bills by borrowers to remove usurious securities, which are a cloud upon the complainant's title to real property, have uniformly been entertained. (See *Cole* v. *Savage*, 10 Paige, 583, questioned, without impeaching the general doctrine, in *Post* v. *Bank of Utica*, 7 Hill, 391; *Peters* v. *Mortimer*, 4 Edw. Ch. 279; *Pearsall* v. *Kingsland*, 3 *id.* 195; *Dry-Dock Company* v. *American Life Insurance and Trust Company*, 3 Comst. 361; *Schermerhorn* v. *Talman*, 14 N. Y. 93; *Manice* v. *Dry-Dock Company*, 3 Edw. 143.)

It is no answer to such a bill that the mortgagor has a good de-

fense to a bill for the foreclosure of the mortgage. It is an apparent incumbrance on the land, Its invalidity depends upon extrinsic facts. The doctrine of *Cox* v. *Clift*, 2 N. Y. 123, cited by the appellant, that the complainant has a perfect legal defense against it (when a right under it is asserted), "written down in the title-deed," has no application to it; and *Ward* v. *Dewey*, 16 N. Y. 519, was decided on like grounds. The mortgage is an impediment to a sale of the land for its value. The mortgagor is not bound to wait until the mortgagee attempts a foreclosure, not only for these reasons, but because in the meantime it may become impossible to prove his defense. If this be so, then, if the lands mortgaged were situated in this State, the mortgage in question was wholly void, and there is sufficient ground for invoking the interposition of the court to decree that such a mortgage be surrendered and cancelled or discharged. Whether it should be so discharged without the payment of that portion of the debt which has not been adjudged to be usurious, and which, for the purposes of this appeal, is to be deemed both legally and equitably due, will be presently considered.

Second, how, then, is the question affected by the circumstance that the mortgaged premises are situated in the State of Ohio, where the mortgage was executed?

The mere circumstance that the land is in another State can, upon no principle that I can discover, furnish a reason for denying the jurisdiction of our courts, or for questioning the propriety of its exercise.[1] . . .

Third, does it follow that the decree in this action, so far as it directed the surrender and discharge of the mortgage, was warranted by well-established rules of equity applicable to the subject?

It is familiar doctrine in courts of equity that "he who seeks equity must do equity," and without that the court of equity will not extend its arm for the relief of the suitor. If he can protect himself, either in whole or in part at law, if he can defend when assailed, very well; he can decline any concession of the equitable rights of the adverse claimant and stand upon his legal position, it may be safe, or it may be in peril, but if he invoke equitable interposition he must come with clean hands and prepared to do whatever in the judgment of equity is fair and equitable to his adversary; else, the court will not entertain him, but will answer, "Stand upon your legal rights, or come here and perform the just condition of equitable relief."

[1] The discussion of this point is omitted.

It is a well-settled principle in executing contracts, if the consideration is illegal and against public policy, the Court would not lend its active aid to enforce it. No rule of law is more clearly defined and settled than this, in the American and English Jurisprudence (3 Head. 297 and 723; 6 Bing. 174; 10 Bing. 110). This Court held in the case of *Overall* v. *Wright, deceased,* at Nashville, December Term, 1865, in manuscript, that an agreement to credit a payment in Confederate Treasury notes, for which Mr. Wurtz had given his receipt, and on the trial sought to have credited on the note, was no payment; that Confederate Treasury notes were issued for an unlawful purpose, and in violation of the laws of the State and Constitution of the United States, and that all contracts founded upon them were illegal, and could not be enforced through the Courts. In the case of *Craig* v. *The State of Missouri,* the Supreme Court of the United States held a promissory note given for certificates issued at the Loan Office of Chariton, Missouri, payable to the State of Missouri, under the Act of the Legislature establishing Loan Offices, was void (4 Peters, 410), the Act being in conflict with the Constitution of the United States.

In the case under consideration, the notes were issued by an unlawful confederation of States, whose declared purpose was to overthrow the Constitution. The enforcement of all such contracts is against public policy. The party seeking the aid of the Court will be repelled. The defendant, not out of any favor to him, but because he is such, can allege and show the illegality of the contract. That being made apparent, the legal consequences follow.

There is no error in the decree of the Chancellor, and the same is affirmed.[1]

[1] *Accord, Drexler* v. *Tyrrell,* 15 Nev. 114 (1880); *Peed* v. *McKee,* 42 Ia. 689 (1876).

Action for foreclosure of a mortgage given to secure part of the purchase money of a house. The defense was that the house was purchased to vendor's (plaintiff's) knowledge for use as a disorderly house. *Held,* for plaintiff, since the contract was executed. *Hager* v. *O'Neill,* 20 Ont. App. 198, affirmed 22 Can. Sup. 510 (1894). *Sed qu.*

A husband and wife entered into an agreement, without the intervention of a trustee, providing that thereafter they should live separate and apart from each other and that the husband would pay the wife $1,000 per year. Some time later the husband executed and delivered to S his bond for $17,000 accompanied by mortgage, to secure said payments to his wife. Suit was brought for foreclosure of the mortgage. *Held,* for defendant, the husband, since the separation agreement, made without the intervention of a trustee, was void as against public policy being in the nature of a contract to alter or dissolve the marriage relation; hence, also, the

McLAUGHLIN *v.* COSGROVE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1868

(99 *Mass.* 4)

WRIT of entry by the heir of a mortgagor of land against the mortgagee in possession after foreclosure. In the Superior Court, on agreed facts which are stated in the opinion, Reed, J., directed a verdict for the tenant, and reported the case.

CHAPMAN, J. The demandant admits that her ancestor, Daniel McLaughlin, gave the tenant two mortgages of the demanded premises; one dated April 25, 1855, and the other dated February 12, 1858; that the tenant entered for foreclosure on the 6th of March, 1863; and that the foreclosure was completed prior to the commencement of this action. But it appears that these mortgages were made to secure the payment of notes which were given in payment for intoxicating liquors illegally sold by the tenant to the mortgagor. By the statute then existing, these notes were void; and it is admitted that, if the mortgage had not been foreclosed, this action could not be maintained. For, as a security for a debt made illegal by statute, the mortgage could not be enforced against the demandant, who is the heir of the mortgagor. It is necessary, then, to consider the effect of the foreclosure.

A deed of mortgage conveys to the mortgagee the legal title to the land, subject to a condition. If the condition be performed according to its terms, the title of the mortgagee is thereby defeated. If not performed at the day, the legal estate remains in the mortgagee, and an equitable right to redeem by payment at a later day is all that remains in the mortgagor, unless he can show that the consideration was illegal, in which case he may defeat the mortgage altogether. But if the grantee enters for breach of the condition, and keeps possession till the right to redeem is foreclosed,

bond and mortgage transaction which was to secure it. *Boyd* v. *Boyd*, 130 App. Div. (N. Y.) 161 (1909).

A husband who was a defaulter, urged his wife to execute a mortgage on her land to secure the sureties on his bond telling her that rather than go to jail, he would commit suicide. The wife finally executed the mortgage with much reluctance. The mortgagees had no knowledge of her hesitation, and they had not yet either threatened or commenced prosecution of her husband. *Held*, on foreclosure, the mortgage was valid. *Lefebvre* v. *Dutruit*, 51 Wis. 326, 8 N. W. 149 (1881).

arise, as well as the amount, are utterly unforeseen and contingent. Without a specification of either of these facts, there exists that reasonable notice which, in favor of those who are not parties to the mortgage, the law demands. The object of the recording law is to prevent fraud on purchasers and creditors; and such facts must be reasonably notified as are sufficient for this purpose; but, as has been shewn, notice perfect and complete, without any enquiry *dehors* the record, is not required.

One head of presumptive notice is this: that the law imputes to the purchaser the knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprized him. Hence it has become a principle in a court of equity, that the notice which presents a certain object, concerning which successful enquiries without unreasonable inconvenience may be made, is sufficient. In *Peters* v. *Goodrich*, 3 Conn. Rep. 150, the above principle was recognized and applied. Curtis executed a mortgage deed to Goodrich, which was duly recorded, with condition to indemnify him against a promissory note, of which the latter was an indorser. To foreclose the equity of redemption, a bill was brought by Goodrich, from which it appeared that the mortgage was variant from the note, both in respect of its date and of the person to whom it was payable. The defendant, who was a subsequent mortgagee, objected against the correction of these mistakes, upon the specific ground that the description in the mortgage deed must be precisely adhered to, pursuant to the supposed policy of the recording system. In the delivery of their opinion the court observed, that "as between the parties, it is unquestionably clear that the misconception of the date of the note and of the promise, admitted of correction, on the common principles applied in chancery in similar cases; and the second mortgagee had such constructive notice of the fact from the recorded deed as placed him in no better condition than the mortgagor. Whatever is sufficient to put a person on inquiry is considered in equity to convey notice; for the law imputes to a person the knowledge of a fact of which the exercise of common prudence and ordinary diligence must have apprized him. Had the second mortgagee applied to Goodrich for information, as it was his intention to represent the facts correctly, relative to the mistakes, he would have had a communication of all the knowledge he now possesses."

The same principle was recognized by the court in *Pettibone* v. *Griswold*, before cited. After having declared it to be the policy of our law that the title to real estate should be registered for the

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SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1868

(99 *Mass.* 4)

WRIT of entry by the heir of a mortgagor of land against the mortgagee in possession after foreclosure. In the Superior Court, on agreed facts which are stated in the opinion, Reed, J., directed a verdict for the tenant, and reported the case.

CHAPMAN, J. The demandant admits that her ancestor, Daniel McLaughlin, gave the tenant two mortgages of the demanded premises; one dated April 25, 1855, and the other dated February 12, 1858; that the tenant entered for foreclosure on the 6th of March, 1863; and that the foreclosure was completed prior to the commencement of this action. But it appears that these mortgages were made to secure the payment of notes which were given in payment for intoxicating liquors illegally sold by the tenant to the mortgagor. By the statute then existing, these notes were void; and it is admitted that, if the mortgage had not been foreclosed, this action could not be maintained. For, as a security for a debt made illegal by statute, the mortgage could not be enforced against the demandant, who is the heir of the mortgagor. It is necessary, then, to consider the effect of the foreclosure.

A deed of mortgage conveys to the mortgagee the legal title to the land, subject to a condition. If the condition be performed according to its terms, the title of the mortgagee is thereby defeated. If not performed at the day, the legal estate remains in the mortgagee, and an equitable right to redeem by payment at a later day is all that remains in the mortgagor, unless he can show that the consideration was illegal, in which case he may defeat the mortgage altogether. But if the grantee enters for breach of the condition, and keeps possession till the right to redeem is foreclosed,

bond and mortgage transaction which was to secure it. *Boyd* v. *Boyd*, 130 App. Div. (N. Y.) 161 (1909).

A husband who was a defaulter, urged his wife to execute a mortgage on her land to secure the sureties on his bond telling her that rather than go to jail, he would commit suicide. The wife finally executed the mortgage with much reluctance. The mortgagees had no knowledge of her hesitation, and they had not yet either threatened or commenced prosecution of her husband. *Held*, on foreclosure, the mortgage was valid. *Lefebvre* v. *Dutruit*, 51 Wis. 326, 8 N. W. 149 (1881).

arise, as well as the amount, are utterly unforeseen and contingent. Without a specification of either of these facts, there exists that reasonable notice which, in favor of those who are not parties to the mortgage, the law demands. The object of the recording law is to prevent fraud on purchasers and creditors; and such facts must be reasonably notified as are sufficient for this purpose; but, as has been shewn, notice perfect and complete, without any enquiry *dehors* the record, is not required.

One head of presumptive notice is this: that the law imputes to the purchaser the knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprized him. Hence it has become a principle in a court of equity, that the notice which presents a certain object, concerning which successful enquiries without unreasonable inconvenience may be made, is sufficient. In *Peters* v. *Goodrich*, 3 Conn. Rep. 150, the above principle was recognized and applied. Curtis executed a mortgage deed to Goodrich, which was duly recorded, with condition to indemnify him against a promissory note, of which the latter was an indorser. To foreclose the equity of redemption, a bill was brought by Goodrich, from which it appeared that the mortgage was variant from the note, both in respect of its date and of the person to whom it was payable. The defendant, who was a subsequent mortgagee, objected against the correction of these mistakes, upon the specific ground that the description in the mortgage deed must be precisely adhered to, pursuant to the supposed policy of the recording system. In the delivery of their opinion the court observed, that "as between the parties, it is unquestionably clear that the misconception of the date of the note and of the promise, admitted of correction, on the common principles applied in chancery in similar cases; and the second mortgagee had such constructive notice of the fact from the recorded deed as placed him in no better condition than the mortgagor. Whatever is sufficient to put a person on inquiry is considered in equity to convey notice; for the law imputes to a person the knowledge of a fact of which the exercise of common prudence and ordinary diligence must have apprized him. Had the second mortgagee applied to Goodrich for information, as it was his intention to represent the facts correctly, relative to the mistakes, he would have had a communication of all the knowledge he now possesses."

The same principle was recognized by the court in *Pettibone* v. *Griswold*, before cited. After having declared it to be the policy of our law that the title to real estate should be registered for the

benefit of creditors and all others interested, it was observed by the court: "That it is the object of this law" (the act requiring deeds to be recorded) "to prevent fraud, and give security and stability to title. It results, unquestionably, that the condition of a mortgage deed must give reasonable notice of the incumbrances on the land mortgaged. A creditor is not obliged by law to make enquiry *in pais* concerning the liens on the property of his debtor; but on application to the record, he may acquire all the information which his interest demands; at least, he must have the power of knowing from this source the subject-matter of the mortgage, that his investigation may be guided by something which will terminate in a certain result. And what is not of less importance, the incumbrance on the property must be so defined as to prevent the substitution of everything which a fraudulent grantor may devise to shield himself from the demands of his creditors." In the argument of this case it has been supposed that the court, in *Pettibone* v. *Griswold*, had required perfect and complete certainty in the condition of a mortgage, so far as relates to strangers to the transaction, and to such a degree as to preclude the necessity of any further enquiry. But the error is most obvious and resulted entirely from the construction of a single sentence in the opinion expressed, disjoined from all other parts of it; as if it had been declared in the form of an axiom, and were insulated and alone. I readily admit that the paragraph immediately succeeding the rule relative to notice, was not expressed with a precision that defies all criticism. Instead of the expression "concerning the liens," more correctly it should have been "concerning the existence of the liens." It was expected, however, to receive its construction as being the part of an entire subject, each sentence contributing something to the precise development of the court's opinion; in pursuance of the maxim, *Ex antecedentibus et consequentibus fit optima interpretatio*. More especially may it be demanded, that it be read with this qualification: "at least, he must have the power of knowing from this source," i. e., from the condition of the deed, "the subject-matter of the mortgage, that his *investigation* may be guided by something which will terminate in a certain result." It is extremely obvious that the case of *Pettibone* v. *Griswold* was not affected by the preceding principles; and this may account for their being perhaps more loosely expressed than they would have been, had a close application of them been required. The mortgage in that case embraced *all future notes and receipts*, without the designation of any, and supplied *neither information*,

Bank v. *Cunningham*, 24 Pick. 270; *Monell* v. *Smith & Jenkins*, 5 Cow. 441; *Lyle* v. *Duccomb*, 5 Bin. 585; 4 Kent's Com. 175; *Lansing* v. *Woodworth*, 1 Sand. Ch. 43; *Barry* v. *Merchants' Ex. Co.*, 1 *id.* 314; *United States* v. *Hooe*, 3 Cranch, 73; *Livingston & Tracy* v. *McInlay*, 16 Johns. 165; *Truscott* v. *King*, 2 Seld. 147).

It is pressed upon us that this mortgage is invalid, because no sum certain is mentioned therein. There might be some force in the argument if the Reciprocity Bank stood in the position of a subsequent purchaser or incumbrancer in good faith, although it will be attempted to be shown that the mortgage would be good as against the bank, even if such were its position. That question will be considered hereafter.

I arrive, therefore, to the conclusion, that this is a valid mortgage as between the parties to it, and that the mortgagee was secured thereby the amount of the advances upon the two drafts mentioned in the complaint, although no sum certain was mentioned on the face of the mortgage. These advances were made prior to the recovery of the judgment of the Reciprocity Bank, and prior, therefore, to any equities of that bank. It follows, therefore, they were made prior to any notice to the Hollister Bank of any such equities. No notice could be given of that which had not an existence. It is established then, it is submitted, that, at the date of the recovery of the judgment by the Reciprocity Bank against Gibson, the Hollister Bank had a good legal, and certainly equitable, mortgage upon the premises, to secure the amount of the two drafts already referred to. Was that judgment a prior lien to the mortgage? The judgment became a lien, at the time it was docketed, upon interest of the defendant therein in all lands in the county of Erie (2 R. S. 359). In equity, the land was undeniably bound to pay off the amount of these two drafts. The law is well settled, that the equitable mortgagee is entitled to a preference over subsequent judgment creditors (*Matter of Howe*, 1 Paige, 129, and the cases there cited; Willard's Eq. Jur. 441, 442; *Rockwell* v. *Hobby*, 2 Sand. Ch. 9; Hilliard on Mort., Vol. I, 451). If this mortgage is to be regarded simply as an equitable mortgage, there can be no question that, in accordance with well-settled rules of law and a uniform current of decision, it is a valid security, and is entitled to priority over the subsequent judgment of the Reciprocity Bank.

But, I think, if that bank had been a purchaser on the day of the recovering of its judgment, or an incumbrancer by way of mortgage for money then advanced, the mortgage of the Hollister

Bank would equally have been entitled to priority. The recording of the mortgage was notice that the Hollister Bank had a mortgage on the premises for the purposes therein specified. There was enough to have put a *bona fide* purchaser or incumbrancer upon inquiry; and an application to the Hollister Bank would have disclosed the sum certain for which the security was held. As was said by the Supreme Court in *Monell* v. *Smith*, *supra*, "we may be obliged to look beyond the face of the bond to see what is due. In a technical sense, that is certain which may be made certain." The precise sum for which the mortgage was held as security might, at any time, readily and with certainty, have been ascertained, and a *bona fide* purchaser or incumbrancer, with the notice which the record of this mortgage furnished him, if he had omitted to make the inquiry which it indicated, could hardly have claimed to have been a *bona fide* purchaser or incumbrancer. The authorities bearing on this question of notice are fully reviewed in the case of *Williamson* v. *Brown*, 15 N. Y. 354, and the result of them stated as follows: "The true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser."

In any aspect in which this case may be regarded, we think it free from doubt, and that the judgment appealed from should be affirmed, with costs.

All the judges concurring,

Judgment affirmed.

YOUNGS *v.* WILSON

Court of Appeals of New York, 1863

(27 *N. Y.* 351)

Appeal from the Supreme Court. Action to foreclose a mortgage. The complaint set forth a bond, executed by Moses W. Eastman to George Youngs and Abel Hunt, bearing date June 4, 1849, in the penal sum of two thousand four hundred dollars, with a condition similar to that of the mortgage next mentioned.

It also set forth a mortgage, bearing the same date and between

made by the mortgagor. This action is brought to foreclose the mortgage, and the only controversy relates to the priority of lien as between the mortgagee and judgment creditors of the mortgagor, whose judgments were obtained subsequent to the mortgage, but prior to the indorsement by the plaintiff, of some of the notes, which enter into and form a part of the mortgage debt.

The question is whether the mortgage is a paramount lien to the judgments, as to that part of the mortgage debt, arising out of indorsements made after the judgments were docketed. It is not claimed that the plaintiff had actual notice of the judgments when he indorsed the paper, and it is found by the referee that he never had personal notice or knowledge, or any notice of their existence, until after all the indorsements had been made. The judgments were docketed in the country where the mortgaged premises were situated. If the docketing of the judgments was constructive notice to the plaintiff of their existence, then he had notice of the judgments; otherwise he had none.

There is no question as to the validity of mortgages to secure future advances or liabilities. They have become a recognized form of security. Their frequent use has grown out of the necessities of trade, and their convenience in the transactions of business. They enable parties to provide for continuous dealings, the nature or extent of which may not be known or anticipated at the time, and they avoid the expense and inconvenience of executing a new security, on each new transaction. It is well known that such mortgages are constantly taken by banks, and bankers, as security for final balances, and banking facilities are extended, and daily credits given, in reliance upon them. Mortgages for future advances have sometimes been regarded with jealousy, but their validity is now fully recognized and established. (*Bank of Utica* v. *Finch*, 3 Barb. Ch. 294; *Truscott* v. *King*, 6 N. Y. 147; *Robinson* v. *Williams*, 22 *id.* 380; *Shirras* v. *Caig*, 7 Cranch, 34; *Lawrence* v. *Tucker*, 23 How. [U. S.] 14; *Leeds* v. *Cameron*, 3 Sumn. 492.)

There can be no doubt, therefore, that the mortgage in this case, as between the parties to it, is a valid security for the plaintiff's debt. It is equally clear that to prefer an intervening incumbrance over the claim of the plaintiff, would violate the understanding of the parties to the mortgage, at the time it was executed, for the plain intention was, that the interest of the mortgagor in the land, as it existed when the mortgage was given, should be bound as security for all liabilities which the plaintiff might incur as indorser, upon the faith of the mortgage. It could not have been intended

that the plaintiff should be deprived of any part of the security of the mortgage, for any part of the indorsed paper. It would have been a clear breach of good faith on the part of the mortgagor, if he had, without notice to the mortgagee, voluntarily incumbered the land by liens having priority of the mortgage, and then applied to the plaintiff for, and procured further indorsements.

If the judgments have a preference over the plaintiff's mortgage, as to indorsements made after the judgments were docketed, it must result from some superior equity of the judgment creditors, or from the effect of docketing the judgments, as constructive notice to the plaintiffs of their existence. The authorities are clear to the point, that upon general principles of equity, no such preference can be claimed. It must, I think, be conceded that, according to general principles of equity, the lien of the plaintiff's mortgage is superior to the lien of the judgments, as well for indorsements made prior to their rendition, as for those subsequently made without notice.

It remains to consider whether, under the statutory system for the registry of liens, the docketing of the judgments was constructive notice to the plaintiff. If the docketing of the judgments was constructive notice to him, of their existence, then, unquestionably, the judgments have preference to the plaintiff's mortgage as to all advances subsequently made.

The general principle of construction of the registry laws upon the point of notice, is that the registration of incumbrances is notice to subsequent incumbrancers only. They are prospective, and not retrospective, in their operation. (*Stuyvesant* v. *Hall*, 2 Barb. Ch. 151; *King* v. *McVickar*, 3 Sandf. Ch. 192; *Howard Ins. Co.* v. *Halsey*, 8 N. Y. 271.) The plaintiff's mortgage was first made, and first recorded, and regarding these facts only, the mortgage was the prior lien. It is claimed, however, that the mortgage did not become an actual lien or incumbrance until the indorsements were made, and that as to each indorsement it became in effect a new mortgage, as of the time when such indorsement was made, and that as to indorsements made subsequent to the docketing of the judgments, the mortgage must be deemed a subsequent lien. It is manifestly true that the mortgage did not become an actual charge on the land, so as to be enforceable by the plaintiff, until he had incurred liability as indorser. But the plaintiff's mortgage was an instrument capable of being recorded under the statute, before any liability had been incurred. It is the general practice to record mortgages, and docket judgments, taken

any subsequent lien or incumbrance to be filed. These provisions were both for the benefit of the Buffalo Company, and if it elected to waive them and go on and complete its contract according to its terms, no subsequent mortgagee has any right to question the equity of its claim to payment. If the party in whose favor the stipulation was made chooses to waive it a stranger to the contract cannot complain or derive any advantage or raise any question based upon a fact that in no way concerned him. When it appears as matter of law, from an inspection of the instrument, that the prior mortgagee may decline to make the advances at his pleasure, without taking the risk of subjecting himself to damages or loss, the rule can be defended upon equitable principles. But where the obligation to advance exists, or where the right to decline depends upon facts *dehors* the instrument, and which may be the subject of dispute or contention, the holder of the first security is warranted in making the advances in reliance upon his mortgage. In the present case the Buffalo Company had no right to refuse further delivery of goods unless it could establish a breach of some of the conditions of the contract upon which the right to refuse depended. This it could not do by a mere production and inspection of the writing, but would be obliged to resort to proof of extraneous facts which might be disputed, and, in some cases, it is quite conceivable that a party might fail in the attempt to establish them to the satisfaction of a court or jury. It would be incorrect in law and unjust in practice to hold that goods, delivered under such a contract, were subject to the rule applicable to mere optional advances. Moreover this contract may have been, and, we must assume was, a profitable one for the parties who agreed to furnish the building materials. They could not decline to go on, when the subsequent mortgage was given, without sacrificing profits to be derived from a full performance. The company not only protected itself by conditions in the contract for its own benefit, but by mortgage security. It was entitled to all the fruits of the contract, and, though the other party did not perform in all respects, the company could waive the omission and still go on earning these fruits, upon the faith of its security. To hold that, under such circumstances, a subsequent mortgage and a stranger could arrest the performance of such a contract, against the will of the immediate parties, would be, practically, to impair its obligations. All the cases hold that the principle does not apply when a party subjects himself to damages by declining to perform or to make the advances, and, if not, why should it apply to a case

where the loss of the profits or fruits of the contract must follow a failure or omission to perform. In many cases the profits which a party is to derive from full performance of his contract are much larger than any damages which the other party to it could recover against him for failure to perform.

It appears that the appellant's mortgage was upon its face expressly subject to all prior mortgages, and, further, that McCormick, after the assignment of it to appellant as collateral security, executed an instrument to the Buffalo Company in which he stipulated that, irrespective of the date of the delivery of the material, the prior mortgage should be and remain the superior security. Of course, the object of the stipulation was to avoid the very question we have been considering. What effect it had and how far, if at all, it bound the appellant and what significance is to be attached to this clause in the mortgage, expressly subordinating it to all mortgages of prior date and record, are questions of interest ably discussed upon the briefs of counsel, and which have received the attention of the courts below. But as the appellant's claim of equitable priority, which, so far as he is concerned, is fundamental, cannot be sustained, it is unnecessary to consider the other questions.

It follows that the order appealed from must be affirmed, with costs.

All concur. *Order affirmed.*[1]

[1] In *Scheurer* v. *Brown*, 67 App. Div. (N. Y.) 567 (1902), HATCH, J., said (p. 572): "A mortgage is valid which is given to secure future advances (*Ackerman* v. *Hunsicker*, 85 N. Y. 43), and may, under certain circumstances, be good as against a junior incumbrancer, even though all of the advances have not been in fact made. The extent to which it may be enforced, for advances made after notice of a junior incumbrance, it is not now necessary for us to decide, and we express no opinion thereon. It is clear, however, that where the liability to make such advances is optional with the mortgagee, he will not be protected in making them after notice of the existence of the junior incumbrance. (*Hyman* v. *Hauff*, 138 N. Y. 48)."

In *Brinkmeyer* v. *Browneller*, 55 Ind. 487 (1876), WORDEN, C. J., said: "We shall not enter upon any lengthy discussion of the general doctrine applicable to mortgages given to secure future advances. The following propositions, however, we think, are settled by the authorities:

First. Where the mortgagee has bound himself to make advances or incur liabilities, such advances, when made, shall relate back, and the mortgage will be a valid lien for advances made or liabilities incurred, against subsequent purchasers or encumbrancers with notice, actual or constructive, of the mortgage.

Second. Where there is no obligation on the mortgagee, and such advances or liabilities are merely optional with him, and he has actual notice of a subsequent encumbrance or conveyance of the mortgaged premises, before making advances or incurring liabilities, his lien is not good, as against the subsequent purchaser or encumbrancer."

not repairing his part, for it is divisible and follows the land (*Congham* v. *King*, 2 East, 580; Cro. Car. 222). And we are not able to discover any reason why he who takes a larger estate should not be bound by a covenant running with a less estate which is parcel of a larger.

On behalf of the plaintiff it has been argued that the defendant is liable in this action, not only for the rent which has become due since he became owner of the land, but the rent which became due before that time. The cases which have been cited by the defendant's counsel seem to show that the law is not so. It is another argument in favor of the defendant, that when the action is against an assignee, it is usual to allege in assigning the breach of the covenant, that the breach happened after the assignment (2 Chitty's Pl. 191; Lilly, 134; *Dubois* v. *Van Orden*, 6 Johns. 105; Carthew, 177; 2 Ventris, 231). It is said in Woodfall, 274 and 338, that an assignee is liable for arrearages of rent incurred before, as well as during his enjoyment; but he cites no case in which it has been so decided, and offers no argument in support of the propositions, and we are of opinion that this is not law, and there must be judgment for the plaintiff for the rent which has become due since the 3d of April, 1822.

Judgment for the plaintiff.[1]

ASTOR v. HOYT, 5 Wend. 603 (1830). Suit in chancery by the landlord of premises in the City of New York to establish his claim to certain monies awarded to the tenant (Madden) as compensation for opening streets through the premises demised. Madden had mortgaged his term to Hoyt, who thus acquired a prior claim to the fund in question. Madden having covenanted in the lease to pay all assessments, the plaintiff seeks to charge the liability for the breach on the mortgagee. The Chancellor (Walworth) having ordered the payment of the fund in court to the defendant, an appeal was taken by the plaintiff to the Court for the Correction of Errors. On the point under consideration the following opinion was rendered (page 613).

SAVAGE, Ch. J. The question then arises, which was principally discussed upon the argument, is the mortgagee to be considered the

[1] *Farmers' Bank* v. *Mutual Assur. Soc.*, 4 Lehigh (Va.), 69 (1832); *Mayhew* v. *Hardesty*, 8 Md. 479 (1855), *accord*. See also, *Calvert* v. *Bradley*, 16 How. (U. S.) 580 (1853).

assignee of the leasehold premises? And if so, is he liable to payment of the damages for the breach of Madden's covenant? That the covenant to pay all assessments is a covenant running with the land, there can be no doubt (5 Co. 25); and that the assignee is liable for the breach of such a covenant occurring while he is assignee, is equally clear; but whether the mortgagee is assignee, and if assignee, whether he is liable for breaches of the covenant before the assignment, are questions to be discussed. In England I think it must be conceded to be settled that where the mortgagor, by the form of the instrument, conveys or assigns by way of mortgage his whole estate, the mortgagee is considered, at law and in equity too, the assignee. We read, indeed, in some of the books that though the mortgage purports to convey an estate defeasible by matter subsequent, yet that the courts of equity consider them, in their true intent, as mere securities for money; but the decision of the courts, both of law and equity, which are the highest evidence of what the law is, have generally considered mortgages as conveyances; and by the mode of drawing them there it seems necessary that when the condition is performed there should be a reconveyance or reassignment. In *Sparks* v. *Smith*, 2 Vernon, 275, the court refused to compel a mortgagee to disclose whether a lease was assigned to him to enable the plaintiff to prosecute him as assignee upon the covenant of the lessee, who was also mortgagor, clearly implying that as assignee of the whole term, even by way of mortgage, he would be liable; and in *Pilkington* v. *Shaller*, 2 Vern. 374, where a recovery had been had in a similar case against the plaintiff as assignee, the court refused to relieve him, saying the mortgagee was ill advised to take an assignment of the whole term. In the case of *Eaton* v. *Jaques*, Doug. 460, the Court of King's Bench disregarded these cases and thought them not well considered. Lord Mansfield was of opinion that upon principle the assignee is liable only in respect of the possession, and that as a mortgage was a mere security, the mortgagee out of possession was not liable as assignee. About ten years afterwards Lord Thurlow entertained a different opinion, and did what was refused in *Pilkington* v. *Shaller*. He compelled a person who had received a lease in deposit as security, to take an assignment, that he might be prosecuted as assignee upon the covenant of the lessee to build a house. The question seems to have been finally and deliberately settled in *Williams* v. *Bosanquet*, 1 Brod. & Bing. 72, by ten judges, overruling the doctrine of Lord Mansfield in *Eaton* v. *Jaques*. Dallas, Ch. J., in giving the decision of the court, states explicitly the

TRIMM *v.* MARSH

COURT OF APPEALS OF NEW YORK, 1874

(54 *N. Y.* 599)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiffs entered upon the decision of the court at Special Term, and ordering a new trial. (Reported below, 3 Lans. 509.)

This was an action for an accounting as to the amount due upon a bond and mortgage, and for the recovery of the possession of the mortgaged premises, upon payment of the amount due.

In 1858 one Ridgway, being the owner of certain premises situate in the City of New York, mortgaged them to an insurance company to secure $2,000; the insurance company assigned the mortgage to the defendant, Sarah A. Marsh. Ridgway afterward conveyed the premises to the plaintiff, Brown, who subsequently, in October, 1865, entered into an agreement with plaintiff, Trimm, to convey the same to him. In 1861 the defendant, Sarah, commenced an action to foreclose this mortgage, making plaintiff, Brown, and others parties, and obtained judgment of foreclosure. The premises were sold under the judgment in 1862, and defendant, Sarah A. Marsh, became the purchaser, and received a sheriff's deed. Immediately after the sale she entered into possession of the premises, and she or the other defendant has ever since been in possession. In October, 1864, by an order of the Supreme Court, granted after due notice and hearing the parties interested, the foreclosure sale was set aside and declared null and void, and a resale was ordered, which never took place. In November, 1864, the defendant, Sarah A. Marsh, recovered a judgment against plaintiff, Brown, which was duly entered and docketed, and in 1865 she caused an execution to be issued upon said judgment to the Sheriff of New York, who, in May of the same year, sold all "the right, title and interest" of which the said Elizabeth C. Brown was seized or possessed in the said land, the said Sarah A. Marsh becoming the purchaser and taking the sheriff's certificate of sale. In September, 1865, she conveyed the said premises by deed to the other defendant, and in September, 1866, after the commencement of this suit, she also transferred to him the sheriff's certificate, and he soon after received the sheriff's deed. The defendant, William B. Marsh, had notice of all the facts when he

took his title, and was not a *bona fide* purchaser for value. Since the defendants went into possession of the premises they have assumed and claimed an absolute title, free from any right of redemption in the plaintiffs or either of them.

The plaintiffs commenced this action to redeem the said premises from the mortgage and judgment of foreclosure, and the principal defence relied on by the defendants was their title under the judgment and execution sale against plaintiff, Brown. The referee decided the same in favor of plaintiffs, holding that the execution sale, being made by the assignee of the mortgagee in possession, was null and void and conferred no title upon the purchaser.

Earl, C. The only legal proposition involved in this case, which we deem it important to consider, is whether a mortgagee of real estate in possession can cause the equity of redemption of the mortgagor to be sold on an execution and become the purchaser of the same, and, after obtaining the sheriff's deed, set up his title as acquired against the claim of the mortgagor to redeem from the mortgage in an equitable action commenced by him for that purpose; or, to state the proposition in other words, has the owner of the equity of redemption of mortgaged premises, after default and after the owner of the mortgage has taken possession, such an interest in the premises as can be sold upon execution against him? If this question be answered in the affirmative, the decision of the General Term was right and must be affirmed.

The respective rights of the mortgagor and mortgagee in the land mortgaged have been the subject of much discussion, and it is impossible to reconcile all that learned judges and writers have said upon the subject. By the common law of England the legal estate was vested in the mortgagee, to be defeated by the performance of a condition subsequent, to wit, payment at the law day. In default of such payment, the title became absolute and irredeemable in the mortgagee. But, two centuries ago, courts of equity assumed jurisdiction to relieve mortgagors against forfeitures, and, thenceforth, in equity a mortgage has been regarded as a mere security, as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself.

These equitable principles have had an increasing influence upon courts of law, and Chancellor Kent says that "the case of mortgages is one of the most spendid instances in the history of our jurisprudence of the triumph of equitable principles over technical

his wife executed a mortgage upon said land to the loan commissioners of said county, to secure the sum of $1000 loaned to him. This mortgage contained covenants that Martin B. and his wife were lawfully seised of a good, sure, perfect, absolute and indefeasible estate of inheritance in the premises, and that they were free and clear of and from all former and other gifts, grants, bargains, sales, liens, etc., and this mortgage was, on the day of its date, duly recorded in the book kept by the loan commissioners, as required by law. On the 23d of January, 1860, a deed of said lands, bearing date April 1, 1853, was recorded in the county clerk's office, which purported to be executed by Martin B. and wife to his father. On the 16th day of December, 1859, Gamaliel Perkins conveyed said land to Martin B., by deed recorded January 14, 1860. Until this conveyance from his father Martin B. had no title to the land, although he remained in possession of the same from 1848. On the 31st of January, 1867, Martin B., being still in possession of the lands, conveyed them to the plaintiff, who paid full value for the same without any actual notice of the mortgage to the loan commissioners. The deed to the plaintiff was recorded February 9, 1867.

The court below decided that plaintiff was not entitled to the relief sought, and directed a dismissal of the complaint. Judgment was perfected accordingly.

EARL, C. The plaintiff claims that the mortgage to the loan commissioners has no validity as against him, and that his deed has priority over it under the laws in reference to the registry of deeds and mortgages. It is a principle of law, not now open to doubt, that ordinarily, if one who has no title to lands, nevertheless makes a deed of conveyance, with warranty, and afterward himself purchases and receives the title, the same will vest immediately in his grantee who holds his deed with warranty as against such grantor by estoppel. In such case the estoppel is held to bind the land, and to create an estate and interest in it. The grantor in such case, being at the same time the warrantor of the title which he has assumed the right to convey, will not, in a court of justice, be heard to set up a title in himself against his own prior grant; he will not be heard to say that he had not the title at the date of the conveyance, or that it did not pass to his grantee in virtue of his deed (*Work* v. *Welland*, 13 N. H. 389; *Kimball* v. *Blaisdell*, 5 *id.* 533; *Somes* v. *Skinner*, 3 Pick. 52; *The Bank of Utica* v. *Mersereau*, 3 Barb. Ch. 528, 567; *Jackson* v. *Bull*, 1 Johns.

Cas. 81, 90; *White* v. *Patten*, 24 Pick. 324; *Pike* v. *Galvin*, 29 Maine, 183). And the doctrine, as will be seen by these authorities, is equally well settled that the estoppel binds not only the parties, but all privies in estate, privies in blood and privies in law, and in such case the title is treated as having been previously vested in the grantor, and as having passed immediately upon the execution of his deed, by way of estoppel. In this case Martin B. Perkins conveyed the lands to the loan commissioners, by mortgage with warranty of title, and thereby became estopped from disputing that, at the date of the mortgage, he had the title and conveyed it, and this estoppel applied equally to the plaintiff to whom he made a subsequent conveyance, by deed, after he obtained the title from his father, and who thus claimed to be his privy in estate. The plaintiff was estopped from denying that his grantor, Martin B. Perkins, had the title to the land at the date of the mortgage, and he must, therefore, for every purpose as against the plaintiff, be treated as having the title to the land at that date.

I, therefore, can see no difficulty in this case, growing out of the law as to the registry of conveyances. Martin B. Perkins, having title, made the mortgage which was duly recorded. He then conveyed to his father and the deed was recorded. His father then conveyed to him and the deed was recorded. He then conveyed to the plaintiff and his deed was recorded. Thus the title and record of the mortgage were prior to the title and record of the deed to plaintiff, and the priority claimed by plaintiff cannot be allowed. Assuming it to be the rule that the record of a conveyance made by one having no title, is, ordinarily a nullity, and constructive notice to no one, the plaintiff cannot avail himself of this rule, as he is estopped from denying that the mortgagor had the title at the date of the mortgage.

I am, therefore, of opinion that the judgment should be affirmed, with costs.

For affirmance, Earl, Gray and Johnson, CC.

For reversal, Lott, Ch. C., and Reynolds, C.[1]

Judgment affirmed.[2]

[1] The dissenting opinion of REYNOLDS, C., is omitted.

[2] See also, *Northrup* v. *Ackerman*, 84 N. J. Eq. 117 (1914).

its after incumbrances and limitations, imposed by him or his grantees; and it assumes what is not true, that Mrs. Mack already had the entire title of the mortgagor, and so could take nothing from him but only the right of the mortgagee. The mortgagor had the absolute title incumbered only by the mortgage. That title he transferred to the church, but when the latter conveyed to Mack it reserved an easement or servitude, and so parted with less than it received from the mortgagor. This title Mrs. Mack took, and therefore did not get the entire interest which the mortgagor himself had. There was something which she had not got, which by a foreclosure of the Bell mortgage would pass, and which it was possible for her to purchase.

A further ground is stated which is based upon a theory that Mrs. Mack by virtue of her ownership of the lot came under some obligation to pay off the mortgage, and so could not in equity assert a title founded upon a breach of that obligation. Cases are cited in other States which hold that the mortgagor owes to his mortgagee the duty of paying taxes upon the land and cannot by neglecting their payment and causing a sale and then becoming a purchaser, cut off the lien of the mortgagee. If the purchase had been made by Mr. Mack, who had assumed the payment of the mortgage, the question would have arisen. But Mrs. Mack owed no duty of payment either to the mortgagee or to the plaintiff. She assumed no such obligation. She violated no duty and incurred no personal liability by omitting to pay off the incumbrance. It was her right and privilege not to do so, and in the omission she did no wrong of which either party could lawfully complain. She had the right to leave the mortgagee to his remedy, and when he asserted it, the law allowed her to become the purchaser, and made no distinction between her rights and those of a stranger to the title.

It was urged that this view of the case left the plaintiff without any power to save its easement, since on the sale Mrs. Mack could safely outbid all others and beyond the mortgage debt. But the plaintiff should not have waited until the sale. When brought into court as a defendant, and certain to be bound by the decree, it should have sought to modify the decree and, showing the peril of its easement and offering to bid the full amount of the mortgage debt and costs upon a sale subject to the servitude, it should have asked that the sale be so made. The mortgagee could not object since his debt would be paid in full and he had no greater right; and Mrs. Mack could have asserted no equity to have the sale so

made as to free her from the easement. But when no limitation or condition is imposed by the decree, and no duty of payment rests on the purchaser, the statute determines the estate which passes by the foreclosure deed.

The judgment of the General Term should be reversed and that of the Special Term affirmed, with costs.

All concur.

Judgment accordingly.[1]

CHAPPELL *v.* JARDINE

Supreme Court of Errors of Connecticut, 1884

(51 *Conn.* 64)

Suit for a foreclosure; brought to the Superior Court. The defendants demurred to the complaint; the court (Andrews, J.) overruled the demurrer and passed a decree of foreclosure. The defendants appealed to this court. The case is sufficiently stated in the opinion.

Park, C. J. This is a suit for the foreclosure of certain mortgaged premises, constituting an island, known as Ram Island, in Long Island Sound. The complaint alleges that the land mortgaged at the time the deed was given lay in the town of Southhold, Suffolk County, in the State of New York, and it is averred that the mortgage was recorded in the office of the clerk of Suffolk County in that State. It is further alleged that Ram Island, by the recent establishment of the boundary line between the State of New York and this State, has become a part of the town of Stonington in this State. The complaint is demurred to, so that the averment stands admitted that the island was, when the mortgage was made, a part of the State of New York.

We have heretofore held (*Elphick* v. *Hoffman*, 49 Conn. 331) that the boundary agreed upon by the joint commission of the two States and established by the legislative acceptance of both States, was to be regarded as presumably a designation and establishment of the pre-existing boundary line which had become lost, and not as

[1] The principal case was followed in *National Bank* v. *Levy*, 127 N. Y. 549 (1891), where Bradley, J., said at p. 553: "And when the equity of redemption is foreclosed the purchaser takes the estate the mortgagor had at the time he gave the mortgage."

CHAPTER I. (*Continued*)

Section II.—Possession

KEECH *v.* HALL

Court of King's Bench, 1778

(1 *Douglas*, 21)

Ejectment tried at Guildhall before Buller, Justice, and verdict for the plaintiff. After a motion for a new trial, or leave to enter up judgment of nonsuit, and cause shown, the court took time to consider; and now Lord Mansfield stated the case and gave the opinion of the court, as follows:

Lord Mansfield. This is an ejectment brought for a warehouse in the city by a mortgagee against a lessee under a lease in writing for seven years, made after the date of the mortgage by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was no notice to quit; so that, though the written lease should be bad, if the lessee is to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, for the court to decide is whether, by the agreement understood between mortgagors and mortgagees, which is that the latter shall receive interest and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor and wrongdoer.

No case has been cited where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the home circuit (*Belchier* v. *Collins*); but there the mortgagee was privy to the lease, and afterwards, by a knavish trick, wanted to turn the tenant out. I do not

wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself or get a friend to do it. The idea that the question may be more proper for a court of equity goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration, a court of equity must follow, not lead, the law. On full consideration, we are all clearly of opinion that there is no inference of fraud or consent against the mortgagee to prevent him from considering the lessee as a wrongdoer. It is rightly admitted that if the mortgagee had encouraged the tenant to lay out money he could not maintain this action; but here the question turns upon the agreement between the mortgagor and mortgagee; when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and, therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt, on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If by implication the mortgagor had such a power, it must go to a great extent, to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage, for it is the nature of the transaction that the mortgagor shall continue in possession. Whoever wants to be secure when he takes a lease should inquire after and examine the title deeds. In practice, indeed (especially in the case of great estates) that is not often done, because the tenant relies on the honour of his landlord; but whenever one of two innocent persons must be a loser, the rule is *qui prior est tempore, potior est jure.* If one must suffer, it is he who has not used due diligence in looking into the title.

It was said at the bar that if the plaintiff, in a case like this, can recover, he will also be entitled to the *mesne* profits from the tenant in an action of trespass, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for

year, ending May 1, 1821, for the rent of 400 dollars, payable quarterly.

M. Howel, a witness for the plaintiff, testified that the defendant took possession of the premises, under the said lease, at its commencement, on the first of May, 1820, and has since continued in occupation thereof. The witness, in answer to a question, which was objected to by the defendant's counsel, but allowed by the court, and the point reserved, said that he joined in the execution of the lease merely as surety for the payment of the rent by the defendant, Jones, and had never occupied the premises. It was proved that, at the expiration of the term, Jones, without the intervention or concurrence of Howel, agreed with Clark, one of the plaintiffs below, to take the premises for another year, at the same rent.

The defendant below gave in evidence a bond of Gilbert Stewart to R. Pratt and W. Durant, for 6000 dollars, payable on the 4th of February, 1821, and a mortgage to them of the premises, dated February 4, 1819, duly recorded; and also a lease from Pratt and Durant, to the defendant, of the premises in question, dated February 7, 1821, for one year, commencing May 1, 1821, at the yearly rent of 400 dollars; which lease contained a clause, by which the lessors engaged to indemnify the defendant against all claims for rent by any other persons; and also a general assignment by Gilbert Stewart of all his property, including the premises in question, to the plaintiffs below, dated August, 1819, in trust for the benefit of his creditors, as specified in the assignment.

A verdict was taken by consent, for the plaintiffs below, for one quarter's rent, subject to the opinion of the court, &c., on which a judgment was, afterwards, rendered by the court below.

SPENCER, Ch. J., delivered the opinion of the court. The points made by the counsel for the plaintiff in error, are, 1. That there was no sufficient evidence that Jones held under Clark and Stewart.

2. That Howel was an incompetent witness.

3. That the matters shown by the defendant below were a complete defence.

The first and second points may, at once, be disposed of. There was complete evidence of the hiring of the premises by Jones, for the second year. Howel was a competent witness to show that he had no beneficial interest in the expired lease, though the fact itself was no wise material. The cause depends on the third point; and it presents this question, whether a tenant of the mortgagor in

possession, and who became such subsequent to the giving the mortgage, can, in a suit by his landlord, the mortgagor, set up as a legal defence, that after the mortgage became forfeited he attorned to the mortgagee and took a lease from him, during the continuance of the lease from the mortgagor. This case has probably been decided in the court below on the authority of the case of *M'Kircher* v. *Hawley*, 16 Johns. Rep. 289. The principle decided in that case was this: that a mortgagee could not distrain for rent becoming due under a lease made by the mortgagor subsequent to giving the mortgage, because there was no privity of estate or contract between the mortgagee and such a tenant; and we held that, to enable a party to distrain for rent, he must have a concurrent right to maintain an action for the rent; and if there was no privity of contract or estate, an action could not be maintained.

When the plaintiff in error attorned to the mortgagees and took a lease from them, their title to enter under their mortgage was complete; for, the day of payment having passed, the condition was broken, and the estate of the mortgagees was absolute at law. This case, then, presents a very different question from the one decided in *M'Kircher* v. *Hawley*. There the point was whether the mortgagee could distrain, or, in effect, sue for the rent. Here it is whether the tenant of the mortgagor could not, by his own act and consent, become the future tenant of the mortgagees, without any disloyalty to the mortgagor. "At common law," says Mr. Butler (in note 272 to Co. Litt. 309 *a*), "attornment signified only the consent of the tenant to the grant of the seigniory; or, in other words, his consent to become the tenant of the new lord." He goes on to show the operation of the statute of *quia emptores*, and the statute of uses, and the statute of wills, and observes that the necessity and efficacy of attornments have been almost totally taken away by the statutes of 4 and 5 Anne, c. 16, and 11 George II, c. 19. These two statutes have been re-enacted here. The former does not relate to this case, but the latter has an important and decisive bearing upon it. The 28th section of the statute concerning distresses, rents, and the renewal of leases (1 N. R. L. 443), after reciting that the possession of estates is rendered precarious by the frequent and fraudulent practice of tenants attorning to strangers, by which means landlords and lessors are turned out of possession, and put to the difficulty and expense of recovering possession by suits at law, enacts that every such attornment shall be null and void, and the possession of the landlords or lessors shall not be deemed to be, in any wise, changed by any such attornment;

them in fee to his son, Henry C. Matthewson, and upon his death they, with other real estate, came into the possession of the plaintiff, whose wife was one of said Matthewson's heirs at law; that, being thus in possession, the plaintiff leased the shop in question to the defendants by parol, from March 1, 1858, to March 1, 1859, at the rent of $200 for the year, payable quarterly; that after the death of his father, the son's mortgage having become due, on the 13th day of May, 1858, he sued the plaintiff in ejectment to recover possession of the estate of which the shop in question was a tenement, and gave notice to the defendants to pay their rent to him as mortgagee; that the defendants, having offered under the advice of counsel to pay rent to the plaintiff if he would give them a bond of indemnity against the claim of the mortgagee, which he did not do, promised the mortgagee to pay the rent to him, and did pay to him the last three quarters rent, accruing from the first day of June, 1858, to the first day of March, 1859, under a bond of indemnity from the mortgagee against the claim of the plaintiff, to recover which rent, after such payment, this action was brought. The rent of the quarter during which notice was given by the mortgagee to the defendants to pay the rent to him, was paid by them to the plaintiff.

AMES, C. J. It seems to be clear, upon principle, and is well settled by authority, that a mortgage by the lessor of lands under lease, operating as an assignment *pro tanto* of the reversion, carries the rent as incident to it to the mortgagee. In such case, therefore, all that the law requires of the mortgagee to entitle him to rent of the tenant of the mortgagor, is notice to the tenant to pay the rent to him; such notice preventing any injustice to the tenant from double payment.

If, on the other hand, the lease be subsequent to the mortgage, as the mortgage gives to the mortgagee no title to the reversion out of which the lease was granted, he cannot by mere notice compel the tenant to pay rent to him, nor does his title to the rent accrue until he has obtained possession of the mortgaged estate. He is not the landlord of the mortgagor, nor by virtue of the relation between them entitled to the rents and profits of the mortgaged estate as long as the mortgagor retains possession (*Evans* v. *Elliot*, 9 Ad. & Ell. 159; *The Manchester Hospital and Life Ins. Co.* v. *Wilson*, 10 Met. 126).

The mortgage, however, conveys the title to possession to the mortgagee, and, indeed, when, as in this case, forfeited, the whole

title at law; and, unless some statute forbid, which none here does, the tenant of the mortgagor may attorn to the mortgagee, and by thus placing him in possession of the mortgaged premises entitle him to the rents thereof. There is no disloyalty to his landlord in such attornment by the tenant, since thereby he only recognizes a title which his landlord has granted (*Jones* v. *Clark*, 20 Johns. 51). In *Evans* v. *Elliott, supra*, Lord Denman seems to agree that the tenant's attornment will create a privity between himself and the mortgagee, or, as he expresses it, "is at least necessary" to create the relation of tenant and landlord between them; although he decides that the attornment will not relate back to a notice before given by the mortgagee to the tenant, but creates the privity and right to rent only from the time when it is actually made. As attornment is nothing more than the consent of the tenant to the grant of the seignory, or, in other words, to become tenant of the new lord (Co. Lit. 309 *a;* Butler's note, 272), and the tenants in this case, by promising to pay and actually paying the rent to the mortgagee, thus attorned to, and became tenants to him, it follows that they rightfully paid to him the subsequently accruing rent and cannot be compelled to pay it over again to the plaintiff. Judgment must therefore be rendered for the defendants, for their costs.[1]

Teal *v.* Walker, 111 U. S. 242 (1884). Mr. Justice Woods (247). The decision of the question raised by the demurrer to the complaint is not affected by the stipulation contained in the defeasance of August 19th, 1874, that Goldsmith and Teal should, on default made in the payment of the principal of Goldsmith's note, and on the demand of Hewett, surrender the mortgaged premises to him. If this was a valid and binding undertaking, it did not change the rights of the parties. Without any such stipulation, Hewett, unless it was otherwise provided by statute, was entitled, at least on default in the payment of the note of Goldsmith, to the possession of the mortgaged premises (*Keech* v. *Hall*, 1 Doug. 21; *Rockwell* v. *Bradley*, 2 Conn. 1; *Smith* v. *Johns*, 3 Gray, 517; *Jackson* v. *Dubois*, 4 Johns. 216; *Furbush* v. *Goodwin*, 29 N. H.

[1] *Stedman* v. *Gassett*, 18 Vt. 346 (1846), *accord*. That neither entry by the mortgagee nor attornment of the tenant is necessary to entitle the mortgagee to "intercept" the rents, see *Marx* v. *Marx*, 51 Ala. 222 (1874); *Comer* v. *Sheehan*, 74 Ala. 452 (1883). But compare *Drakford* v. *Turk*, 75 Ala. 339 (1883), and see *Bartlett* v. *Hitchcock*, 10 Bradw. (Ill.) 87 (1881), *contra*.

half of a lot of land situate in Brighton, Monroe County. The facts appear sufficiently in the opinion. The court directed a verdict in favor of defendants, which was rendered accordingly.

ANDREWS, J. The plaintiffs claim title under Alfred Hubbell, the mortgagor, to the undivided half of premises mortgaged by him to Hiram Sibley, December 1, 1846, to secure the payment of $7,000. The action is ejectment, and it was necessary for the plaintiffs, in order to recover under their complaint, to show that they were entitled, as against the defendants, to the possession of the premises at the time of the commencement of the action. The defendants are the grantees of Sibley, the mortgagee, under a deed dated June 7, 1849, and are in possession, claiming under that deed. They stand, by reason of that conveyance, in privity with the mortgagee, and their right to the possession is the right of the mortgagee, and the right of the plaintiffs depends upon the same principles as if Sibley was in possession and the action had been brought against him (*Jackson* v. *Mueller*, 10 J. R. 479; *Jackson* v. *Bowen*, 7 Cow. 13; *Robinson* v. *Ryan*, 25 N. Y. 320). The plaintiffs on the trial offered to prove that the mortgage debt had been paid by the receipt by Sibley, before the commencement of the action, of rents and profits from the land sufficient to satisfy it. The evidence was excluded. If the mortgage was in law subsisting and unsatisfied when the action was commenced, then it cannot be maintained, as the authorities are decisive that ejectment will not lie by a mortgagor against a mortgagee in possession (*Van Duyne* v. *Thayre*, 14 Wend. 233; *Phyfe* v. *Riley*, 15 Wend. 248; *Pell* v. *Ulmar*, 18 N. Y. 139). Leaving out of view the alleged title under the statute foreclosure, the question arises, whether the receipt by a mortgagee in possession of rents and profits sufficient to satisfy the mortgage debt, does *ipso facto* extinguish it and discharge the lien of the mortgage. If it does not, then the evidence was properly excluded. If admitted, it would not have shown a right in the plaintiffs to the possession of the premises when the action was brought.

It is the settled doctrine in this State that a mortgagee has by virtue of his mortgage a lien only, and not an estate in the land mortgaged (*Runyan* v. *Mersereau*, 11 J. R. 537; *Jackson* v. *Craft*, 18 *id.* 110; *Jackson* v. *Bronson*, 19 *id.* 325; *Kortright* v. *Cady*, 21 N. Y. 343; *Stoddard* v. *Hart*, 23 *id.* 560). In harmony with this view it was held in *Kortright* v. *Cady* that a tender of the mortgage debt after it became due discharged the lien of the mortgage and prevented a subsequent foreclosure. And it was held in

Edwards v. *The Fireman's Fire Ins. and Loan Co.*, 21 Wend. 467, 26 *id.* 541, that upon a tender after default by a mortgagor of the mortgage debt, ejectment would lie in his favor upon the refusal of the mortgagee to surrender the possession. But while no title in a strict sense vests in the mortgagee of land until foreclosure, yet his interest is, in some cases, treated and regarded as a title, for the purpose of protecting and enforcing the equities between parties. An instance of this is found in *Mickles* v. *Townsend*, 18 N. Y. 575, where it was so held for the purpose of applying the doctrine of estoppel by deed against a person claiming as assignee of a mortgage which existed at the time of his prior conveyance of the mortgaged premises with warranty, but which was assigned to him afterward. And in *Van Dyne* v. *Thayre*, 19 Wend. 162, the release of the equity of redemption by the mortgagor to the mortgagee was held to inure as an enlargement of the estate of the mortgagee so as to prevent the plaintiff's recovering dower at law, in disregard of the equity of the defendant to have the mortgage first satisfied out of the land (Cowen, J., 21 Wend. 485).

It is easy to see that where the English doctrine prevails, that the mortgage conveys a legal title to the mortgaged premises, the right of the mortgagor to an account of the rents and profits of the land received by the mortgagee is purely and exclusively of equitable cognizance. At law, the mortgagee is the owner of the estate, and takes the rents and profits in that character. In equity, the mortgagor is regarded as the owner until foreclosure, and his right to an account is incident to his right of redemption (2 Wash. on Real Property, 161, 205; *Seaver* v. *Durant*, 39 Vt. 103; *Parson* v. *Welles*, 17 Mass. 419). But the necessity to resort to an accounting in equity, in order to have the rents and profits applied to the satisfaction of the mortgage, is not obviated by the fact that here the mortgagor retains the legal title. The mortgagee in possession takes the rents and profits in the quasi character of trustee or bailiff of the mortgagor (2 Pow. on Mort., 946 *a;* 2 Wash. 205). They are applied in equity as an equitable set-off to the amount due on the mortgage debt (*Ruckman* v. *Astor*, 9 Paige, 517.) The law does not apply them as received to the payment of the mortgage. It depends upon the result of an accounting upon equitable principles, whether any part of the rents and profits received shall be so applied. The mortgagee is entitled to have them applied, in the first instance, to reimburse him for taxes and necessary repairs made upon the premises; for sums paid by him upon prior incumbrances upon the estate, in order to protect the title, and for costs

NASH *v.* PRESTON

COURT OF KING'S BENCH, 1631

(3 *Cro. Car.* 190)

A BILL in chancery was referred to Jones, Justice, and myself [Croke, J.] to consider whether one should be relieved against dower demanded, &c.

The case appeared to be that J. S., being seised in fee, by indenture inrolled, bargains and sells to the husband for one hundred and twenty pounds, in consideration that he shall re-demise it to him and his wife for their lives, rendering a peppercorn; and with a condition that if he paid the hundred and twenty pounds at the end of twenty years the bargain and sale shall be void. He re-demised it accordingly, and dies; his wife brings dower.

The question was, whether the plaintiff shall be relieved against this title of dower?

We conceived it to be against equity and the agreement of the husband at the time of the purchase, that she should have it against the lessees; for it was intended that they should have it re-demised immediately to them as soon as they parted with it; and it is but in nature of a mortgage; and upon a mortgage, if land be redeemed, the wife of the mortgagee shall not have dower. And if a husband take a fine *sur cognisance de droit come ceo*, and render arrear, although it was once the husband's, yet his wife shall not have dower, for it is in him and out of him *quasi uno flatu*, and by one and the same act. Yet in this case we conceived that by the law she is to have dower; for by the bargain and sale the land is vested in the husband, and thereby his wife entitled to have dower; and when he re-demises it upon the former agreement, yet the lessees are to receive it subject to this title of dower; and it was his folly that he did not conjoin another with the bargainee, as is the ancient course in mortgages. And when she is dowable by act or rule in law, a court of equity shall not bar her to claim her dower, for it is

against the rule of law, viz., "Where no fraud or covin is, a court of equity will not relieve." And upon conference with the other justices at Serjeants-Inn upon this question, who were of the same judgment, we certified our opinion to the court of chancery that the wife of the bargainee was to have dower, and that a court of equity ought not to preclude her thereof.

NOEL *v.* JEVON, 2 Freem. Ch. 43 (1678). *In Curia Cancellariæ.* The bill was to be relieved against the defendant's dower, her husband being only a trustee; and it appearing that the husband was but a trustee, the defendant was barred of her dower, contrary to the opinion of *Nash* v. *Preston*, 1 Cro. Car. 191, and so it was said is the constant practice of the court now.[1]

CASHBORN *v.* INGLISH

COURT OF CHANCERY, 1738

(7 *Vin. Abr.* 156)

THE resolution of the court by LORD CHANCELLOR [HARDWICKE]. The principal question in this case, on which I am now to give my opinion, is whether the defendant Inglish can be tenant by the curtesy of an equity of redemption. The mortgagee came into possession in 1731.

Thomas Cashborn, father of the plaintiff and of the wife of the defendant Inglish, by virtue of a marriage settlement being seized of some lands in tail and of other lands in fee simple, had issue three daughters. Part of the land of which he was seized in fee he settled on himself for life, with remainder to Anne, his eldest daughter in fee, and the other part of such lands he devised by his will to the said Anne, his daughter, and her heirs, subject to the payment unto her two sisters of £200 apiece. Anne, after the death of her father, borrowed £900 of the defendant Scarf, and by lease and release of 24th and 25th of June, 1728, mortgages part of the fee simple lands to the said Scarf and his heirs, under

[1] "If the husband was seised merely as trustee, the wife would be entitled to dower at common law; but this court would not suffer her to take advantage of it."—*Hinton* v. *Hinton*, 2 Ves. Sen. 634. "Because the estate, in equity, would not belong to the trustee but to the *cestui que trust*."—*Finch* v. *Earl of Winchelsea*, 1 P. Wms. 278.—Rep.

the like case, and because the doctrine recognizing the legal title of the mortgagor before foreclosure first originated in this court, and was confirmed in the Court of Appeals, and, finally, because it is a most just and reasonable doctrine, and has been so acknowledged throughout the history of the cases.[1]

STOW *v.* TIFFT

Supreme Court of Judicature of New York, 1818

(15 *Johns.* 458)

This was an action of dower, brought to recover dower in two lots in Douglas patent, in the town of Bolton, in the county of Warren. The tenant pleaded *ne unques seisie que dower*, and *ne unques accouplé in loyal matrimonie*. The cause was tried before Mr. J. Yates, at the Warren circuit, in June, 1817.

The marriage of the demandant, and the death of her husband in December, 1804, were proved. Timothy Stow, the husband of the demandant, purchased the premises in question during the coverture, and paid part of the consideration money; and to secure the payment of the residue, executed, at the time of receiving the conveyance, a mortgage of the same premises to the grantor; after his death the land was sold under a power contained in the mortgage, and was purchased by a person from whom the tenant derived his title.

A verdict was found for the demandant, subject to the opinion of the court, on a case containing the above facts.

Spencer, J., delivered the opinion of the court.[2] The demandant's right to recover her dower depends on the nature of her husband's seisin. Timothy Stow, her husband, purchased the premises in question after his marriage with the plaintiff, and paid part of the consideration money; and for securing the residue, he, at the time of receiving his conveyance, executed to the grantor a mortgage of the same premises. After his death the premises were sold under a power contained in the mortgage, and the defendant holds under that sale. The question to be decided is whether there was such a seisin of the husband of the demandant as to entitle her

[1] This is the general rule in the United States; but see *Stelle* v. *Carroll*, 12 Peters, 201 (1838).

[2] Dissenting opinion of Thompson, Ch. J., omitted.

to dower. This depends on the single point whether the seisin of the husband was an instantaneous seisin or not. If it was an instantaneous seisin, then, according to all the authorities, the wife is not endowable. This general position is met with in all our books, that the husband's seisin for an instant does not entitle the wife to dower. This is exemplified by the case of *Amcotts* v. *Catherick*, Cro. Jac. 615. There the husband, who was seised in special tail, made a deed of feoffment to the use of himself for life, and after to the use of his son in tail, and made a letter of attorney to make livery. Before livery he took the demandant to wife, and after livery was made to those uses the husband died, and the question was, whether the wife was entitled to dower; and it was adjudged that she was not, for that the livery did not gain to the husband any new estate, but being *eodem instanti* drawn out of him, he gained no seisin whereof his wife was dowable; for that having no estate before the feoffment whereof the wife was dowable, he gained none by the feoffment of which his wife could be endowed. Three cases were there put in which the wife would not be entitled to dower: as where a tenant for life or a joint tenant makes a feoffment; so where a married man took a fine and by the same fine rendered the land to another in tail, his wife shall not be endowed thereof, because, although he took it in fee, yet it is instantly out of him; so if a feoffment be made to one and his heirs, to the use of another and his heirs, the wife of the trustee shall not be endowed, for he was the mere instrument and had but an instantaneous seisin (2 Co. 77).

The case of *Nash* v. *Preston*, Cro. Car. 190, would seem, at first view, to be opposed to the proposition that a deed to the purchaser and a mortgage given back by him to the grantor at the same time, would not entitle the wife of the purchaser to her dower; yet it is observable that the principle is admitted that an instantaneous seisin of the husband does not entitle the wife to dower. Croke admits that if a husband take a fine *sur cognisance de droit come ceo* and render arrear, although it was once the husband's, yet his wife shall not have dower, for it is in him and out of him *quasi uno flatu* and by one and the same act. That case does not state that the redemise was made at the same time with the bargain and sale, and I presume it was not. That case, therefore, does not bear on the general principle.

I am authorized to say, by the decision of this court in *Jackson* v. *Dunsbagh*, 1 Johns. Cas. 95, that where two instruments are executed at the same time between the same parties relative to the

and obvious purpose of which is to add the right of the mortgagee to the right bought of the husband. The widow is left where her own voluntary act placed her. By joining in the mortgage she postponed her dower to the equity of redemption. She has that right still, and seeks to enlarge it because of a payment made not by her husband, or in performance of a duty due to him or those representing him, but by one acting wholly in his own interest and seeking to add to that as acquired from the husband the further right held by the mortgagee. The purchaser in the present case took his land charged as surety for the husband's debt. While he, personally, was not bound to pay it, his land was held, and paying the debt of husband and wife, as represented by the mortgage, he had a right, as against them, to be subrogated to the position of the mortgagee and to stand in equity as the purchaser and holder of his security.

Thus far I have assumed that the giving of the new mortgage operated as a payment, *pro tanto*, of that held by the bank. That is a needless concession, because the finding in this case rebuts any intention of payment, and establishes that a severance of the original lien was all that was contemplated by the parties, and the giving of the new mortgage was meant, in its practical effect, to serve as a transfer of so much of the original lien to the severed parcel. Equity may look through the form of the transaction to ascertain its substance, and so looking cannot fail to see that the new mortgage is so much of the old one in a changed form, but secures the old debt as did its predecessors. The finding is justified by the facts, and upon that basis the dower remains subject to the proportionate part of the original lien.

I think these views are fully sustained by the authorities. In *Swaine* v. *Perrine*, 5 Johns. Ch. 491, the mortgage given by the husband and wife was outstanding at his death; the equity of redemption passed to the heir who redeemed the land by paying the mortgage, and the widow who claimed dower was required to contribute her ratable proportion of the redemption money. In *Popkin* v. *Bumstead*, 8 Mass. 491, the husband and wife joined in a mortgage to one Capen, and after the death of the husband his administrator, under the order of the probate court, sold the equity of redemption to Wheelock, who conveyed it to Bumstead. The latter paid off the mortgage and it was discharged of record. The widow thereupon demanded her dower, but the court held she was barred.[1] This case, which is very like the one at bar, was

[1] *Cf. Eaton* v. *Simonds*, 14 Pick. (Mass.) 98 (1833).

cited in *Van Dyne* v. *Thayre*, 19 Wend. 171, with apparent approval. Judge Cowen reviews many of the cases and holds that *Collins* v. *Torry*, 7 Johns. 278, and *Coates* v. *Cheever*, 1 Cow. 475, were decided without full consideration. Near the close of his opinion he says: "My deduction from this and other cases, I state in the words of Chancellor Kent (4 Comm. 45, 3d ed.), the wife's dower in the equity of redemption only applies in case of redemption of the incumbrance by the husband or his representatives, and not when the equity of redemption is released to the mortgagee or conveyed." I am not aware that the authority of that case has been overthrown.

The cases cited in behalf of the widow confirm rather than question the views we have expressed. In *Bartlett* v. *Musliner*, 28 Hun, 235, the purchaser had assumed and agreed to pay the mortgage debt as a condition of his purchase, and, having come under that obligation, might be deemed to have paid in behalf of the husband or his estate. The distinction is referred to in Jones on Mortgages, vol. 1, § 866, where it is said that, if the mortgage "be redeemed by the heir or purchaser, or by any one interested in the estate who is not bound to pay the debt, to avail herself of this right she must contribute her proportion of the charge according to the value of her interest." In *Runyan* v. *Stewart*, 12 Barb. 537, the action was at law, and, while a majority of the court sustained the claim of dower, it was explicitly said that the result would be different in equity. In that case Runyan and his wife gave a mortgage, and thereafter the husband gave a conveyance to Baker, who assumed the payment of the mortgage. The court question the case of *Popkin* v. *Bumstead* (*supra*), but add that, in equity, Baker might be subrogated and have a decree for contribution. No reference was made to the assumption of the mortgage by Baker. In *Jackson* v. *Dewitt*, 6 Cow. 316, there was a release to the mortgagee and dower was denied. In *Wedge* v. *Moore*, 6 Cush. 8, the whole argument is founded upon an assumption of the mortgage debt by the purchaser, which is argued out from the facts. In *Platt* v. *Brick*, 35 Hun, 127, the action was by the purchaser of the equity of redemption, who was not bound to pay the mortgage debt, to compel the mortgagee to assign his mortgage for the protection of the purchaser's title against dower, its amount having been tendered. The court held that the assignment could be compelled; that there was a right of subrogation; that the assignment would not work a merger, and the mortgage could be interposed against the claim of dower. Of course, the technical or formal assignment is material

CLARY *v.* OWEN

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1860

(15 *Gray*, 522)

ACTION of tort by the assignee in insolvency of Heman D. Burghardt, for the conversion of four water-wheels, with the shafts, couplings and other machinery connected with them. At the trial in the superior court the plaintiff introduced evidence of the following facts:

In 1854 Burghardt contracted with John E. Potter, who then owned certain real estate in Barrington, to furnish the water-wheels and machinery, and to set them up in wheel-pits to be prepared by Potter on the premises, for the sum of $3,500, of which $500 was paid at once, and the balance was to be paid on the completion of the work, in notes secured by a mortgage of the property, or by a mechanic's lien. In the latter part of 1854, Burghardt, in pursuance of this contract, constructed the wheels in question, which were made of cast-iron and placed in pairs upon cast-iron shafts, and set them up in penstocks and a flume, the frame of which rested on a stone foundation built by Potter in all respects like the foundation of a building. The wheels were intended for the purpose of driving a paper-mill on the premises; they were outside of the paper-mill building, but the mill could not be used without them.

In January, 1855, before the completion of the wheels and fixtures, the mill was destroyed by fire; Potter failed and abandoned the work; and Burghardt never fulfilled his contract and never received any payment or security, except the $500 paid at the time of making the contract; never delivered the wheels, except in so far as setting them up as above described amounted to a delivery; never offered to return the money which he had received, and never called on Potter for any payment. When the contract was made the premises were subject to certain mortgages, which were afterwards assigned to the defendants, who had previously had notice that Burghardt claimed to own the wheels and machinery, and who, a year after the fire, took possession of the premises, which were in the condition in which the fire had left them, to foreclose the mortgages, and afterwards purchased the equity of redemption.

Upon this evidence PUTNAM, J., ruled that, the wheels having been placed on the premises after the execution of the mortgages,

the action could not be maintained. The plaintiff then offered to show that, by the agreement between Burghardt and Potter, the wheels were to remain the property of the former until completed and payment for them secured by mortgage; but the judge ruled that, even if that were proved, the plaintiff could not maintain his action, and directed a verdict for the defendants, which was returned, and the plaintiff alleged exceptions.

Hoar, J. It is conceded in the argument of the plaintiff's counsel, that the mill-wheels, for the value of which this action was brought, must be considered, as between mortgagor and mortgagee, fixtures belonging to the realty. They were essential to the operation of the mill, and were intended, when completed and paid for, to be permanently attached to the land. If the mortgagor had himself annexed them to the freehold, there could be no doubt that the mortgagee would hold them under his mortgage, and that they could not be severed without his consent (*Winslow* v. *Merchants' Ins. Co.*, 4 Met. 306). But it is contended that the mortgagor being in possession, and having agreed with Burghardt that the wheels should remain the personal property of the builder until they were completed and provision made for paying for them, the wheels, having been set up under this agreement, could not be claimed and held by the mortgagee.

If this position were tenable, it would follow that the mortgagor could convey to another a right in the mortgaged premises greater than he could exercise himself. But it is well settled that, although the mortgagor, for some purposes, and as to all persons except the mortgagee, may be regarded as the absolute owner of the land, yet the title of the mortgagee is in all respects to be treated as paramount. The mortgagor cannot make a lease which will be valid against the mortgagee; and if the mortgagee enter, neither the mortgagor nor his lessee will be entitled to emblements (Pow. Mortg., c. 7; *Keech* v. *Hall*, 1 Doug. 21; *Lane* v. *King*, 8 Wend. 584; *Mayo* v. *Fletcher*, 14 Pick. 525). And we think it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which as between mortgagor and mortgagee would become a part of the realty. The entry of the mortgagee would entitle him to the full enjoyment of the premises, with all the additions and improvements made by the mortgagor or by his authority.

Whether a person putting a building upon land by license of the

considering arises between them, as mortgagors, and their mortgagees, Whitaker and Phillips, who, for the purposes of their security, are to be regarded as purchasers.

The building was erected for a saw-mill, and in the form and nature of its structure was adapted to the business of a mill of that description. The boilers and engines were the only motive power, and were designed so to be when the mill was built. They performed the office of a wheel and water-power, and their adaptation to the structure and the uses for which it was designed, as well as the mode of their annexation, show that they were intended to be permanent. They could not be removed without leaving the saw-mill incomplete. The building itself for any other purpose would, without material alterations and additions, be comparatively of little value. The shafting, drum, balance wheel, gearing for the upright saw, and the muley saw and gearing, though differing from the boilers and engines in the mode of annexation, yet are to be regarded as fixtures.

The mode of annexation alone does not determine the character of the property annexed; but the appropriateness of the articles named to the mill, and their necessity to its completeness, are also to be looked to.

III. The remaining question is, whether the chattel mortgage to the plaintiffs, as against the real estate mortgagees, deprives the property in controversy of the character of fixtures? The plaintiffs claim that this is the effect of the chattel mortgage; and that they have the same right to recover the property from the mortgagees (Whitaker and Phillips), without notice, as they would have had against Farley & Ketcham, if the real estate mortgage had not been given.

It is not necessary to inquire what, as against mortgagees without notice, would have been the rights of a party, other than the owner of the freehold, who might have placed in the same manner upon the premises the property in question, under some agreement with the owner, for a temporary purpose, and with the right of removal; nor as to what would have been the effect if the property had been annexed by the tortious act of Farley & Ketcham. The facts in this case raise neither of these questions, and we forbear entering into an examination of the authorities cited bearing upon them. Here it was not only the intention of Farley & Ketcham to annex the property to, and make it a part of, the freehold, but their so doing was according to the understanding of the parties when the mortgage to the plaintiffs was executed. In the mortgage it said

the boilers are "designed to be used in their (F. & K.'s) saw-mill," and power is given the plaintiffs, on default of payment, "to take possession thereof (mortgaged property) whether the same shall be attached to the freehold and in law become a part of the realty or not." The right given to the plaintiffs by the mortgage to enter upon the premises and sever the property would, doubtless, have been effectual as between the parties. But the defendants were purchasers without notice of this agreement. The filing of chattel mortgages is made constructive notice only of incumbrances upon goods and chattels. The defendants purchased and took a conveyance of real estate of which the property now in question was, in law, a part; and, in our opinion, it devolved upon the plaintiffs who sought to change the legal character of the property and create incumbrances upon it, either to pursue the mode prescribed by law for incumbering the kind of estate to which it appeared to the world to belong, and for giving notice of such incumbrance, or, otherwise, take the risk of its loss in case it should be sold and conveyed as part of the real estate to a purchaser without notice. It is true that in the case of *Ford* v. *Cobb*, 20 N. Y. Rep. 344, it was held that an agreement which was evidenced by a chattel mortgage was effectual against a subsequent purchaser of the land, without notice. But it seems to us to be sounder rule, and more in accordance with principle, and the policy of our recording laws, to require actual severance, or notice of a binding agreement to sever, to deprive the purchaser of the right to fixtures or appurtenances to the freehold (*Fortman* v. *Goepper*, 14 Ohio St. Rep. 565; 2 Smith's L. C. 259; *Fryatt* v. *Sullivan Co.*, 5 Hill, 116; *Richardson* v. *Copeland*, 6 Gray, 536; *Frankland et al.* v. *Moulton et al.*, 5 Wisconsin Rep. 1).

In the case last named, the owner of a steam engine sold and assisted to annex the same to the realty, reserving a chattel mortgage on the same for a part of the purchase money; and it was held that the chattel mortgage was inoperative as against a prior mortgagee of the real estate. The mode of annexation was very similar to that existing in the case under consideration; and the holding that the chattel mortgage was inoperative as against a prior mortgagee of the real estate, as was likewise done in *Copeland* v. *Richardson*, *supra*, restricts the operation of agreements to sever what would otherwise be regarded as fixtures, more than is required to be done for the decision we make in the present case. Whether the restriction upon the right of removal that was applied in these cases can be properly applied in favor of a mortgagee of the real

limit to the rights of a conditional vendor as between him and an innocent purchaser or mortgagee of real estate without notice who advances his money on the faith of a perfect title.

But as to that portion of the property mentioned in the answer of the defendant Root and in the agreed statement of facts on file, which had not been placed in the mill or factory at the time of the execution of the mortgage to the orator, but was in the yard and put in place in the factory or mill afterwards, the right of the defendant Root is paramount to the right of the orator. That, not having been annexed to the realty at the date of the mortgage, would not pass as incident to the realty; and the mortgage did not divest Root of his title. It having been placed in the building by the mortgagors after the execution of the mortgage, the mortgagee might hold it as against them, but not as against Root, the conditional vendor. As to this portion of the property the mortgagee was not misled, and advanced nothing on the faith of it.

The decree of the Court of Chancery is reversed, and cause remanded for a decree of foreclosure for orator against all the defendants as to all the property, except that defendant Root have a right to that portion of the property, or the value thereof, not in place in the factory or mill at the time of the execution of the mortgage to the orator, but put in afterwards, the orator having his election to pay to Root the value of it, or have it excepted in the decree so far as Root is concerned, with liberty to Root to remove it within such reasonable time as the Court of Chancery shall fix for that purpose.[1]

TIFFT *v.* HORTON

Court of Appeals of New York, 1873

(53 *N. Y.* 377)

Appeal from judgment of the General Term of the Superior Court of Buffalo, affirming a judgment in favor of the plaintiffs, entered upon the verdict of a jury.

This action was brought to recover damages for the alleged conversion of a boiler and engine.

[1] *Buzzell* v. *Cummings*, 61 Vt. 213 (1888); *Haven* v. *Emery*, 33 N. H. 66 (1856); *Wickes* v. *Hill*, 115 Mich. 333 (1897), *accord*. And see *Knowlton* v. *Johnson*, 37 Mich. 47 (1877), and *Lansing Iron Works* v. *Walker*, 91 Mich. 409 (1892). *Cf. Campbell* v. *Roddy*, 44 N. J. Eq. 244 (1888).

The plaintiffs, under a written contract, manufactured the engine and boiler in question, with other machinery, for Mrs. Jane Coombs Brown, to be put up and used in a new elevator which Mrs. Brown was building, in the city of Buffalo. By the terms of the contract, Mrs. Brown was to give for a portion of the purchase-price of the boiler, engine and other machinery her two promissory notes, to be secured by a mortgage on the boiler and engine. The notes and mortgages were to be executed and delivered so soon as the engine and boiler were complete in the plaintiffs' shop, ready to be put up at the elevator. The boiler and engine and other machinery were completed according to the contract; and while in the plaintiffs' shop the mortgage was given as provided in the contract. It was provided in the mortgage that the engine and boiler should be and remain personal property until the notes mentioned in it were fully paid, notwithstanding the manner in which they should be placed in the elevator. The mortgage recited the fact that the engine and boiler were made to be put up in the elevator of Mrs. Brown, pursuant to the agreement above mentioned, and authorized the plaintiffs, in case of a breach of its condition, to enter the elevator and take and carry the boiler and engine away. Mrs. Brown failed to pay the second note secured by the mortgage. The boiler and engine were not put in the elevator building, but on a foundation made for them outside of the building; and a building called the engine-house was built over them after they were set up. After the mortgagor failed to pay the note, plaintiffs went to take the boiler and engine, and, finding the defendants in possession, demanded them. The defendants claimed to own them, and refused to let the plaintiffs have them. The defendants claimed title to the engine and boiler through three real estate mortgages, executed by Mrs. Brown before the boiler and engine were set up on the premises. These mortgages had been foreclosed, and the premises sold under judgments obtained in the foreclosure actions, and the premises bid off by and conveyed to the defendants. The rights of the parties, by stipulation before sale, were not to be affected by the sales on the judgments in the foreclosure actions. The defendants asked the court to decide, as matter of law, that there was not any evidence of a conversion by the defendants of the boiler and engine. This the court declined to do. The defendants requested the court to decide that the boiler and engine were a part of the realty, as between the parties to this action, notwithstanding the written agreement. The court refused so to decide. The jury rendered a verdict in favor

owner of the inheritance) after the date of the mortgage annexed the fixtures in question for a permanent purpose and for the better enjoyment of his estate, he thereby made them a part of the freehold which had been vested by the mortgage deed in the mortgagee." It is to be borne in mind, too, that in England and in Massachusetts the rights of a mortgagee of land in the mortgaged premises are greater than in this State. He is regarded as the owner and the mortgagor in the light of a tenant. So that things annexed to the land become fixtures upon the land of the mortgagee, as it were. See case last cited, page 133; *Butler* v. *Page*, 7 Metc. 40.

The judgment should be affirmed, with costs to the respondents. All concur.

Judgment affirmed.[1]

REYNOLDS *v.* ASHBY & SON

HOUSE OF LORDS, 1904

(*L. R.* [1904] *A. C.* 466)

HOLDWAY, the lessee of land in Reading for ninety-nine years from 1892, was in April, 1900, building a factory thereon for a joinery business. On April 7 Holdway mortgaged the premises to Burrows, "together with the buildings, fixtures, machinery and fittings erected thereon." Holdway afterwards executed a second mortgage to Hatt, and on August 27 a third mortgage to the respondents.

On August 30 Holdway and the appellant (a manufacturer of machines) made a hire-purchase agreement, whereby the appellant agreed to let machinery to be used in the factory, and Holdway agreed to hire and to pay for it by instalments at specified times, the machinery to become the property of Holdway as soon as the payments were all duly made, but if default was made in punctual payment of any of the instalments Holdway might determine the

[1] *Duffus* v. *Howard Furnace Co.*, 8 App. Div. (N. Y.) 567 (1896); *Eaves* v. *Estes*, 10 Kans. 314 (1872); *Cochran* v. *Flint*, 57 N. H. 514 (1877); *First National Bank* v. *Elmore*, 52 Iowa, 541 (1879); *Campbell* v. *Roddy*, 44 N. J. Eq. 244 (1888); *Brinkley* v. *Forkner*, 117 Ind. 176 (1888); *Warren* v. *Liddell*, 110 Ala. 232 (1895); *Willis* v. *Munger Machine Co.*, 13 Tex. Civ. App. 677 (1896), *accord*. And compare *McFadden* v. *Allen*, 134 N. Y. 489 (1892), and *Brannon* v. *Vaughan*, 66 Ark. 87 (1898).

See also note, 13 Col. Law Rev. 247–249 (1913).

hiring and enter and resume possession of the machinery, which was to continue to be the sole and absolute property of the appellant until the last payment was made.

In September the machines—heavy carpenter's tools—were put up on the ground floor of the factory (in the words of Lord Lindley's judgment) "on beds of concrete prepared for them. The machines were worked by steam power transmitted from a steam engine by shafts, wheels, and gearing in the usual way. Each machine was complete in itself. Each was fastened down to its concrete bed by bolts and nuts. The bolts were firmly fixed in the concrete and passed through and projected beyond holes in the machine. The nuts were screwed on the ends of the bolts where they projected, and the machines were thus held fast. By unscrewing the nuts each machine, although heavy, could no doubt be raised up and removed without injury to the building containing it, and without injury to its concrete bed and to the bolts embedded in it."

In November Hatt took possession of the premises under his mortgage, and Holdway having made default in payment the appellant gave him notice determining the hiring and demanding the return of the machinery. In December the respondents took transfers of the prior mortgages, having bought up the mortgagees' interests. The respondents having refused to deliver up the machinery the appellant brought this action against them, claiming the machinery or damages. Lawrance, J., who tried the action did not leave any question to the jury and entered judgment for the defendants. This decision was affirmed by the Court of Appeal (Collins, M. R., Romer and Mathew, L. JJ.) [1903] 1 K. B. 87. Hence this appeal.[1]

Lord James. My Lords, it must be taken that the appellant was aware that the machines would be used in a factory and would be affixed in the usual manner to the building.

In the first instance I was disposed to think that the question of chattel or fixture, being one of fact, ought necessarily to have been submitted to the jury, but apparently the course taken by the learned judge in treating the question as one of law, or as one of fact upon which the jury were bound to accept his directions and apply the law as declared by him, was correct, and certainly was acquiesced in by both parties to the suit.

[1] Concurring opinions of the Earl of Halsbury, L. C., and of Lords Macnaghten and Lindley are omitted.

equally adapted for use in any other worsted mill, were purchased and sold from stock, were in large part held by the mortgagors upon a conditional sale title, were put into the mill before the execution of the mortgage to the defendant; in view also of the fact of the silence of the record upon the matter of the mortgagee's knowledge or ignorance of the quality of his mortgagors' title, and of the further fact that as between the members of the firm the machinery was treated as chattels when, upon the dissolution of the firm, Daniels sold to O'Connell by bill of sale "all the machinery" and at the same time gave a deed of all his interest in the real estate, and, upon all the reported testimony, we are of opinion that a question of fact was presented and that it was properly submitted to the jury. *Maguire* v. *Park*, 140 Mass. 21. *Carpenter* v. *Walker*, 140 Mass. 416, 420. *Smith* v. *Bay State Savings Bank*, 202 Mass. 482.

We find no error in the admission or rejection of testimony prejudicial to the defendant.

In accordance with the terms of the report judgment is to be entered upon the verdict.

So ordered.[1]

[1] In *Central Union Gas Co.* v. *Browning*, 210 N. Y. 10 (1913), *held*, mortgagee secured no right to gas ranges as fixtures, but they remained personal property.

KING *v.* SMITH

HIGH COURT OF CHANCERY, 1843

(2 *Hare*, 239)

W. SMITH conveyed and surrendered certain freehold and copyhold estates to the use of J. Reid and his heirs, by way of mortgage, to secure £2700 and interest. W. Smith, by his will, gave all his real and personal estate to the defendant, S. Smith (who was also his heir-at-law, customary heir, and sole executor), "in hopes that he might be able to pay his (the testator's) just debts, and find a surplus for his trouble." J. Reid devised his legal interest in the mortgaged premises to the plaintiffs, and appointed them his executors. The plaintiffs, by their bill, charged that the mortgaged premises were a "scanty security" for the principal and interest due, and that the plaintiffs were entitled and claimed to be specialty creditors upon the general estate of the mortgagor for the deficiency, and that, to ascertain the same, the mortgaged premises ought to be sold. The bill prayed an account of the mortgage debt, a sale accordingly, and payment out of the proceeds; and if the same were insufficient, that the plaintiffs might be declared to be specialty creditors upon the estate for the deficiency; that, if necessary, the suit might be taken as being on behalf of the plaintiffs, and all other the unsatisfied creditors of W. Smith, and the personal and real estate duly administered and applied.

After appearance and before answer the plaintiffs filed their supplemental bill, stating that, since the original bill was filed, the defendant had felled, and was proceeding to fell and carry away large numbers of timber and timber-like trees which were growing on the mortgaged premises, that many of such trees were lying upon the lands, and had been advertised for sale, and praying an account of the trees felled, and of the monies produced by the sale,

to a license from the mortgagee to the mortgagor or his assignee, to do the acts which are charged in this action as a trespass. The facts in the case do not present this question. We have no means of knowing whether any such usage and general understanding exist. The argument of the counsel, therefore, cannot avail, as it does not apply. If such usage and understanding existed at the time of the transactions of which we have been speaking, and were considered as amounting to a license, and pleadable as such against the deed in question, they should have been disclosed in the form of a special plea, and the question arising thereon left to the decision of the jury. As the case stands, the plaintiff must have judgment for the value of the timber and costs, according to the agreement of the parties.[1]

COOPER *v.* DAVIS

Supreme Court of Errors of Connecticut, 1843

(15 *Conn.* 556)

This was an action of trover to recover the value of a pair of Burr mill-stones, taken by the defendant.

The cause was tried at New-Haven, January term, 1843, before Waite, J.

The plaintiff claimed title to the property in question, by virtue of a sale made to him by Walter S. Thompson and Charles Cooper. The defendant, who admitted the taking, claimed a right to do so, under the following circumstances. In October, 1839, he was the owner of an old grist-mill, and, having purchased a tract of land for the site of a new grist-mill, he entered into a written contract with Thompson, Cooper and David O. Way, to build and complete the new mill. After they had erected the building for the new mill, and before it was completed according to the contract, viz., on the 21st of February, 1840, the defendant sold and conveyed to them the whole property owned by him, belonging to the old mill and the new one, including the mill-stones in question. To secure the balance of the purchase-money unpaid at the time of the sale, they afterwards, on the same day, gave two promissory notes, and executed and delivered to the defendant a mortgage deed of the same property. At this time said mill-stones had been taken from

[1] *Pettengill* v. *Evans*, 5 N. H. 54 (1829); *Dorr* v. *Dudderar*, 88 Ill. 107 (1878), *accord*. So in Vermont, after condition broken: *Langdon* v. *Paul*, 22 Vt. 205 (1850); *Hagar* v. *Brainerd*, 44 Vt. 294 (1872).

the old mill and placed by the side of the new one, to be used for its completion. They soon afterwards finished it, and put it in operation for grinding corn and other grain, using said mill-stones for this purpose. The lower stone was set in a frame, fastened to the floor of the mill, and was fastened therein by means of wedges driven between the stone and frame; and in all other respects the stones were placed in the mill in the manner in which mill-stones are usually placed in grist-mills.

Cooper and Way having failed to pay one of their notes after it became due, the defendant brought his bill for a foreclosure, and, at the term of the Superior Court in January, 1842, obtained a decree against them, limiting the time of redemption to the first Monday of July, 1842. At the same term the defendant recovered judgment against them in an action of ejectment for the mortgaged premises. He afterwards took out execution on this judgment, and placed it in the hands of an officer to be executed. The officer made demand of Thompson and Cooper for the possession of the premises, who informed him that he lived upon them, and requested a delay of one week that he might remove his family therefrom; to which the officer consented. In the meantime Thompson and Cooper repaired to the mill and removed therefrom the mill-stones, and sold them to the plaintiff, who carried them to a certain shed and placed them there for safe-keeping. The defendant afterwards found them in the shed, took them away and converted them to his own use; which is the taking complained of in the declaration. Cooper and Way, the mortgagors, continued in possession of the mill from the time of the sale made to them until after the removal of the mill-stones.

Upon these facts the plaintiff claimed that he was entitled to a verdict in his favour; that the mill-stones were not conveyed to the defendant by virtue of the mortgage deed and, consequently, that he never had any interest in them; that the mortgagors, having placed them in the mill for the purpose of carrying on their business, might lawfully remove them at any time while they continued in possession; that having so removed them they might legally sell and deliver them to the plaintiff, and the plaintiff prayed the court so to instruct the jury.

The court did not so instruct them, but informed them that although the mill-stones were not conveyed to the plaintiff by virtue of the mortgage deed, yet, having been placed in the mill in the manner stated, they became annexed to the freehold, and the mortgagors had no right to remove them therefrom and convey

fore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be. It could, therefore, be of no consequence whether the injury occurred before or after forfeiture of the mortgage. The action is clearly maintainable.

It only remains, therefore, to be considered whether there was any error in the charge of the court. In order to come to a correct conclusion upon this point, it becomes necessary to examine the exceptions to the charge in connection with the undisputed testimony in the cause, and the propositions upon which the court were required to charge. It had been proved that the defendants knew of the mortgage, that the mortgagors were insolvent, and that the property had been advertised for sale by virtue of the mortgage. They were forbidden to remove the fences and timber, for the reason that the security would thereby be impaired. It was also proved that the value of the mortgage had been impaired by such removal. Under this state of facts the defendants' counsel asked the court to charge the jury that McGraw, having the fee of the land and being in possession, had a right to take off the fences and timber; that the acts being lawful could not be deemed to have been done wrongfully or fraudulently. The court charged that the acts were lawful if they did not prejudice the plaintiff's rights or impair his security, but that if they had impaired the security, knowing the plaintiff's lien, they were liable. As an answer to the propositions of the defendants' counsel, the charge was correct. Acts may be harmless in themselves, so long as they injure no one, but the consequences of acts often give character to the acts themselves. It is upon this distinction that the maxim is based, *sic utere tuo ut alienum non lædas*. As I have before observed, the lien of the plaintiff upon the land was paramount to any interest which the defendants possessed therein, and any wilful injury of that lien by them was a violation of the plaintiff's rights, for which an action would lie.

The defendants' counsel also asked the court to charge that, the plaintiff having alleged in his declaration that the defendants did the acts fraudulently and with a design to injure the plaintiff, he was bound to prove the allegations by evidence other than the mere act of removing the timber for the emolument of the defendants. The court refused so to charge, to which there was an exception. This proposition is somewhat obscure, but I understand it to mean that the plaintiff should prove that the primary motive of the defendants was to cheat the plaintiff. If the defendants knew that by taking off the timber the value of the plaintiff's

mortgage as a security would be impaired, they would be legally chargeable with a design to effect that object, although their leading motive may have been their own gain. A man must be deemed to design the necessary consequences of his acts. If, therefore, he does a wrongful act, knowing that his neighbor will be thereby injured, he is liable. It is upon this principle that persons are often chargeable with the intent to defraud creditors, or to commit any other fraud. The immediate motive is oftentimes self-interest, but if the necessary consequence is a fraud upon his neighbor, the actor is legally chargeable with a design to effect that result. Upon the whole, therefore, although the charge is not quite so explicit as it should be, yet taken in connection with the propositions presented to the court, I think it was substantially correct. The judgment of the Supreme Court should be affirmed.

Judgment affirmed.[1]

WILSON *v.* MALTBY

Court of Appeals of New York, 1874

(59 *N. Y.* 126)

Appeal from order of the General Term of the Supreme Court in the third judicial department, affirming an order of Special Term denying a motion for a new trial.

This action was brought for the foreclosure of a mortgage made by the defendant, George Hubbard, and wife. Plaintiff sought to recover of defendants, C. S. Maltby and Thorn J. Houston, in case the mortgaged premises should not realize, upon sale, sufficient to pay the mortgage debt, the value of certain wood cut upon the mortgaged premises, the complaint alleging fraud and collusion between them and the mortgagor.

Hubbard purchased the premises in question, being mostly woodland, of plaintiff's intestate, in 1867, subject to a mortgage thereon held by one Knapp, giving the mortgage in suit for part of the purchase-money. In 1871 Hubbard entered into a contract with Maltby and Houston, by which he sold to them the wood growing on the mortgaged premises, the same to be cut by the purchaser, measured and paid for March 1, 1871. Plaintiff, learning that the

[1] *Waterman* v. *Matteson*, 4 R. I. 539 (1857); *Jackson* v. *Turrell*, 39 N. J. L. 329 (1877), *accord*. *Adams* v. *Corriston*, 7 Minn. 456 (1862), *contra*. Compare *Allison* v. *McCune*, 15 Oh. Rep. 726 (1846).

by the mortgagor, his interest is not divested, but he remains the owner of the personalty, and may follow it and recover it or its value of any one who has converted it to his own use (*Stanley* v. *Gaylord*, 1 Cush. 536; *Riley* v. *Boston Water Power Co.*, 11 Cush. 11). But the severance must be wrongful, and, where it is made by the mortgagor or one acting under his authority, whether it is wrongful or not will depend upon the question whether a license to do the act has been expressly given, or is fairly to be implied from the relations of the parties. The true rule is as stated in *Smith* v. *Moore*, 11 N. H. 55, and approved in *Page* v. *Robinson*, 10 Cush. 99, that acts of the mortgagor in cutting wood and timber, or otherwise severing parts of the realty, are not wrongful when from the circumstances of the case the assent of the mortgagee may be reasonably presumed. The relation between a mortgagor and mortgagee is a very peculiar one. The mortgagee takes an estate in fee, but the sole purpose of the mortgage is to secure his debt. Usually in this State the mortgage contains a proviso that the mortgagor may retain possession until condition broken. The object of this is that the mortgagor may have the use and enjoyment of his property, and it implies a license to use it in the same manner as such property is ordinarily used and as will not unreasonably impair the adequacy of the security. If a mortgage be of a dwelling-house, the mortgagor may do many acts, such as acts of repair or alteration, which may involve the removal of parts of the realty, which would not be wrongful because within the license implied from the relations of the parties. If a farmer mortgages the whole or a part of his farm, with a clause permitting him to retain possession, as was probably the case at bar, it is within the contemplation of the parties that he is to carry on his farm in the usual manner, and a license to do so is implied. In such case, it is clear that he is entitled to take the annual crops, and wood for fuel (*Woodward* v. *Pickett*, 8 Gray, 617). And we do not think that the implied license is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry. If, in carrying on similar farms, it is usual and is good husbandry to cut and carry to market wood and timber to a limited extent, a license to do this might be implied from the relation of the parties.

The bill of exceptions furnishes us with so meagre and imperfect a history of the case, that we are unable to say how far these considerations are applicable in the case at bar. But the ruling of the

presiding justice seems to have been general, that the defendant would be liable if the wood and timber were cut from the mortgaged premises, and to have excluded the question whether, under the circumstances of the case, the assent of the mortgagee thereto could fairly be presumed by the jury. We are of opinion that this question should be submitted to the jury, and, therefore, that a new trial must be ordered.

Exceptions sustained.

complainant is entitled to redeem; and the transcript must be remitted to the court below for further proceedings.

The other justices concurred.[1]

MOONEY *v.* BYRNE

Court of Appeals of New York, 1900

(163 *N. Y.* 86)

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 20, 1897, affirming a judgment in favor of defendants, entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Vann, J. The case made by the complaint was that of a mortgagor with a right to redeem from a mortgagee or his devisees in possession. The defendants denied that there was any mortgage, alleged an absolute conveyance from the plaintiff to one Owen Byrne, and a subsequent conveyance from the latter to a *bona fide* purchaser. They also pleaded the Statute of Limitations and specified the period of six and ten years as the limit exceeded by the plaintiff in bringing her action.

The facts agreed upon by the parties and admitted by the pleadings are in substance as follows: On the 14th of August, 1878, the plaintiff owned and was in possession of a parcel of land in the city of New York worth $10,000 and upwards, and at the same time she was indebted to Owen Byrne in the sum of about $3000, secured by three mortgages on said premises, which were under process of foreclosure. In order to secure the payment of this indebtedness she conveyed the land to said Byrne at his request by a deed dated on the day last named and duly recorded. "The said deed was given as security" and for no other purpose. It contained full covenants, subject to said mortgages, which, as it was declared, "shall not merge in the fee, but shall remain valid and subsisting liens." Said Byrne at the same time gave back a defeasance of even date whereby he agreed to reconvey to the plaintiff upon the payment to him within one year of said indebtedness

[1] *Cf. Pritchard* v. *Elton*, 38 Conn. 434 (1871); *Austin* v. *Bradley*, 2 Day (Conn.), 466 (1807).

certain advances which he agreed to make for her benefit and the costs of the foreclosure proceedings. It was stipulated that she should be relieved from personal liability on the bonds and that no judgment for deficiency should "be claimed or entered against her in any action that may be taken upon said bonds or mortgages so long as she and all persons claiming under her shall not dispute or contest the title of the" said Byrne "or his assigns to said mortgaged premises or the amounts due him on said mortgages. . . ." Said instrument also provided "that as to the agreement by the" said Byrne "to reconvey said premises, time is of the essence thereof, and, further, that this instrument shall not be recorded by or on behalf of the" plaintiff, "and that for a violation of this provision this agreement, so far as the same provides for such reconveyance, shall thereupon become utterly null and void." The defeasance was never recorded.

Said Byrne at once took possession of the premises and remained in possession thereof until the 13th of June, 1881, when he conveyed to one Walker by a deed duly recorded, but "said conveyance was made without the consent of the plaintiff, who had no knowledge of it until this action was begun" on the 7th of March, 1895. Said Byrne died on the 11th of January, 1889, leaving a will by which he gave all his property, real and personal, to the defendants. His executor accounted and has been discharged, and the property of the testator has been delivered to the defendants. The plaintiff claimed that the rents and profits of the premises received by Byrne amounted to more than the principal and interest of the debt secured. She alleged in her complaint that if Byrne had conveyed the premises to any one, such conveyance was made without her knowledge or consent. She demanded an accounting as to the amount due from her, and that she might "be at liberty to redeem said mortgaged premises upon payment of whatever may upon such accounting be found due, which this plaintiff hereby offers to pay," and that the defendants be compelled to convey said premises to her. She also demanded alternative and general relief. Said Walker, who still owns the premises, was not made a party to the action. The trial judge dismissed the complaint upon the ground that "the Statute of Limitations is a conclusive defense," and the Appellate Division affirmed, on an opinion rendered in overruling a demurrer to the answer, when the case was in the first department (15 App. Div. 624; 1 *id.* 316).

The facts agreed upon show that there was a mortgage; for a deed, although absolute on its face, when given as security only, is

the time when the plaintiff's right to such reparation was established (*Hart* v. *Ten Eyck*, 2 Johns. Ch. 117; *Peabody* v. *Tarbell*, 2 Cush. 227, 233; *May* v. *Le Claire*, 11 Wall. 236, 237)."

In that case, as in this, the only cause of action alleged or proved was the right to redeem; but as the premises had been wrongfully conveyed, the plaintiff, upon establishing such right, was awarded compensation on the basis of value at the time of the trial. Compensation was allowed as an equitable substitute for actual redemption. In other words, the land which should have been conveyed was appraised by the court, and the defendant compelled to restore the amount of the appraisal, as the only method of redemption possible. The form of relief granted was a money judgment, but that was possible only because a right to redeem had been established, for without that right the relief would be limited to the proceeds of the sale (*Baily* v. *Hornthal*, 154 N. Y. 648, 661). So in the case at bar, the plaintiff established the same right, but the defendant showed that he had placed it beyond his power to reconvey. Thereupon in rebuttal and not as a part of her cause of action, the plaintiff had the right to prove the present value of the land, so as to follow the money presumed to be in the defendant's hands, and redeem that which he had wrongfully substituted for the land, the same as if it were in fact land. Guided by the cardinal principle that the wrongdoer shall make nothing from his wrong, equity so moulds and applies its plastic remedies as to force from him the most complete restitution which his wrongful act will permit (*May* v. *Le Claire*, 78 U. S. 217; *Van Dusen* v. *Worrell*, 4 Abb. Ct. App. Dec. 473; *Miller* v. *McGuckin*, 15 Abb. [N. C.] 204; *Hart* v. *Ten Eyck*, 2 Johns. Ch. 62, 108; *Enos* v. *Sutherland*, 11 Mich. 538, 542; *Budd* v. *Van Orden*, 33 N. J. Eq. 143; s. c., *id.* 564). When he cannot restore the land it will compel him to restore that which stands in his hands for the land, and will not permit him to assert that it is not land when the assertion would be profitable to himself but unjust to the one whom he wronged. He cannot escape by offering to pay what he received on selling the lands, but must pay the value at the time of the trial. He cannot cut off the right of redemption and convert it into a personal liability, for he is still a mortgagee, and subject as such to the mortgagor's rights. The fact that the injured mortgagor need not take the proceeds of the sale, but may insist on the proved value of the land, as well as the pleadings and proofs, show that this is a pure action to redeem, and must be so regarded for all purposes, including the defense of the Statute of Limitations. While the

mortgagor is helpless as against his grantee, she is not helpless as against him.

The defendants insist that as the plaintiff can only recover a money judgment, the cause of action is in the nature of an accounting for money had and received, and hence that the six-year, or at most the ten-year Statute of Limitations is a bar. This is not an action, however, to recover money, but to redeem land from a mortgage, and but for the misconduct of the defendant would have resulted simply in a judgment of redemption, with an accounting for the rents and profits of the land, after payment of the debt by the plaintiff, according to her demand and offer before the commencement of the action. The period of limitation provided by the Code, within which an action to redeem from a mortgage may be maintained, is twenty years after breach of the condition or the non-fulfillment of the covenant therein contained (Code Civ. Pro., § 379). So far as the defendants are concerned, the plaintiff had a right to redeem. She brought her action to redeem and established it by evidence, and was entitled to judgment accordingly; but as that judgment would be ineffectual because the mortgagee had sold the land, equity will simply vary its relief from a judgment of redemption in land to a judgment of redemption in money representing the land. If the plaintiff had not elected to redeem, but to sue for money had and received to her use, the case of *Mills* v. *Mills*, 115 N. Y. 80, relied upon by the defendants, might be an authority. In that case, however, as was stated by this court, "all the relief asked for in the complaint is an accounting and a judgment for a sum of money, and no other relief was needed or possible upon the facts established. This was in no sense an action to redeem, as there was no mortgage and nothing to redeem." The relief demanded, as appears from the appeal book on file in this court, was simply a judgment "for all moneys received by" the defendant. No claim was made that the two transactions, which were four years apart, constituted a mortgage, or that there was ever a right to redeem. The theory of the action was that the defendant lawfully sold the land and should account for the proceeds, after deducting his own claim. Thus, the court said: "Absolute title to the lands was vested in the defendant, evidently with the intention that he might sell them and reimburse himself, and pay over any surplus to his brother." The fundamental fact that the defendant sold without right was wanting in that case, and hence the principle, which is the basis of our judgment, could not be applied. It is the wrongful conveyance by the mortgagee in

Makepeace. This depends mainly on the questions of fact, to which much evidence was taken, whether this arrangement was made with an intent to delay, defeat or defraud the creditors of Makepeace; whether there was a secret trust on the part of the respondents to hold the same, in whole or in part, for the benefit of the mortgagor; and whether there was such a disparity between the value of the estate and the amount for which it was taken as to lead to a reasonable inference of any such fraudulent intent.

(After an examination and summing up of the evidence:)

Upon the whole evidence the court are of opinion that the transaction was not fraudulent, that the equity of redemption was relinquished before the attachment, and that the complainant did not acquire a right to redeem under the officer's deed.

Bill dismissed.

GREEN *v.* BUTLER

SUPREME COURT OF CALIFORNIA, 1864

(26 *Cal.* 595)

APPEAL from the District Court, Twelfth Judicial District, city and county of San Francisco.

This action was brought to compel an accounting and a reconveyance of the property. Plaintiff claimed that the deed and defeasance constituted a mortgage, and that Leavitt, unknown to plaintiff, had paid Butler a large portion of the sum mentioned in the defeasance before the execution of the same, and that the amount thus paid by Leavitt, and the proceeds of the property received by Butler as mortgagee in possession, had satisfied the mortgage, and that Leavitt and Butler had combined together to defraud plaintiff.

The other facts are stated in the opinion of the court.

By the court, SAWYER, J. The referee finds, among other facts, that prior to the 14th of August, 1854, the plaintiff was in possession of the lands described in the complaint; that on that day, for a valuable consideration, he conveyed the said lands and improvements thereon by a deed absolute on its face to the defendant Butler; that although the deed was absolute on its face, it was intended as a mortgage to secure to said defendants certain moneys, due and to grow due, for erecting buildings and improvements thereon for a firm composed of plaintiff

and defendant Leavitt; that on the 20th of October, 1854, the said firm of Green & Leavitt had an accounting with defendant Butler, and that upon said accounting it was found and agreed by all parties that said firm was indebted to said Butler for constructing said improvements in the sum of eight thousand five hundred dollars; that on said 20th day of October said Butler executed and delivered to said Green & Leavitt a written defeasance, whereby he bound himself, upon the payment by them to him on or before March 1, 1855, the said sum of eight thousand five hundred dollars, to convey by quit-claim to said Green & Leavitt the said premises, and covenanted in said defeasance that if, after said 1st day of March, he should sell said premises, he would pay over to said parties any surplus that might arise over his debt and costs; that said defendant Butler on the 1st of February, 1855, with the consent of said plaintiff and said defendant Leavitt, entered into possession of said premises and continued in possession till the 27th day of February, 1855.

"That on the said 27th day of February, A. D. 1855, at said city and county, the said plaintiff and the said defendant, Joseph E. Butler, had an accounting and settlement of and concerning the said plaintiff's interest in and to the land described in said complaint, and the improvements then thereon, and of the furniture then in said 'Ocean House;' on which accounting and settlement the said defendant, Joseph E. Butler, paid to the said plaintiff the sum of two thousand dollars, in four promissory notes, for said plaintiff's interest in and to said land and the improvements thereon, and the furniture then in said house, which said notes were subsequently paid; and the said plaintiff then and there, in consideration of said sum of two thousand dollars, surrendered the said written defeasance to the said defendant, Joseph E. Butler, for cancellation, and the same was thereby cancelled as against the said plaintiff."

The only question arising on the record is as to the effect upon the rights of the parties as to the relief sought in this action, of the surrender of the defeasance to be cancelled, under the agreement found by the referee. The principles stated in the numerous cases cited by appellant's counsel are generally admitted to be correct. But there can be no doubt that a mortgage can make a *bona fide* purchase of the equity of redemption—if, indeed, we may use these terms in the present condition of the law as to mortgages in this State—and thereby acquire an absolute title. The principle is well stated in *Remsen* v. *Hay*, 2 Edw. Ch. 535, in the follow-

was vested absolutely in Rodriguez by deeds duly made and recorded before the conveyances to the complainant and his grantor were executed. The complainant insists that Rodriguez, after, as before, the legal title was conveyed to him, held the premises only as security for a debt. This is the hinge of the controversy between the parties.

The entire tract, of which the premises in controversy form a part, was conveyed by José Maria Villavicencia on the 13th of April, 1852, to his seven children. He died in 1853. The widow and five of the children conveyed to Fulgencio, also one of the children, on the 16th of December, 1867. On the 26th of the same month Fulgencio conveyed to the complainant. By virtue of this conveyance he claims six-sevenths of the tract. That proportion is his if his title be valid.

The widow is the sister of the defendant Rodriguez. On the 4th of December, 1860, she and three of the children, the other four being under age, executed to Rodriguez for money then borrowed a note for four thousand dollars, payable a year from date and bearing interest at the rate of two per cent. a month, payable at the end of each six months thereafter; the interest, "if not so paid, to be added to the principal and draw interest at the same rate, compounding in the same manner." A mortgage upon the entire tract was given at the same time by the makers of the note to secure its payment. The mortgage contained a provision that in default of the payment of the interest as stipulated the principal should become due and payable at the option of the mortgagee, and that the mortgage might thereupon be foreclosed and the premises sold to satisfy the mortgage debt; and that out of the proceeds of the sale the mortgagee should be authorized to retain, besides his debt and costs, a counsel fee of five per cent. upon the amount found to be due. The mortgage contained a further provision that the mortgagee might pay all taxes and incumbrances on the property, and that the amount of such advances should be secured by the mortgage, and should also bear interest at the rate of two per cent. per month. Rodriguez subsequently paid $1,172 to redeem the property from a sale for taxes. On the 29th of April, 1864, the widow and five of the children conveyed to him by a deed absolute in form. It is recited in the deed that the debt secured by the mortgage then amounted to about $10,000. On the 17th of February, 1865, one of the children, who was a minor when this deed was executed, and hence had not joined in it, also conveyed to Rodriguez. Nothing was paid to the grantor. On the 20th of May, 1865,

the other and seventh child, who had then become of age, executed a like conveyance. The consideration paid was $100.

On the 22d of July, 1866, Rodriguez demised the premises so conveyed to him to his co-defendants, Edgar W., Isaac C., and Rensselaer E. Steele. The defendant, George Steele, subsequently became interested in this contract by an arrangement with the lessees. The leasehold term was for five years from the 1st of August, ensuing its date. Rodriguez stipulated that at the end of the term or within five days thereafter the lessees might purchase by paying him $25,000 in gold, and upon such payment being so made, he covenanted that he would, by a sufficient deed, release and quit-claim to the lessees or their heirs and assigns, free from all incumbrances created by him, all the right and title which he then had to the premises or which he might thereafter acquire from the United States or from any of the heirs of José Maria Villavicencia.

The lessees and their assignees insist that they are *bona fide* purchasers without notice.

This proposition cannot be maintained. The contract gave them the option—it did not bind them—to buy at the time specified. That time had not arrived when this bill was filed. *Non constat* that they would then exercise their election affirmatively and pay the stipulated price. But this point is not material. The doctrine invoked has no application where the rights of the vendee lie in an executory contract. It applies only where the legal title has been conveyed and the purchase-money fully paid (*Nace* v. *Boyer*, 30 Pennsylvania, 110; *Boone* v. *Chiles*, 10 Peters, 177, 211). The purchaser then holds adversely to all the world, and may disclaim even the title of his vendor (*Croxall* v. *Shererd*, 5 Wallace, 289).

This contract calls for a quit-claim deed. The result would be the same if such a deed had been executed and full payment made without notice of the adverse claim. Such a purchaser cannot have the immunity which the principle sought to be applied gives to those entitled to its protection (*May* v. *Le Claire*, 11 *id.* 232; *Oliver* v. *Piatt*, 3 Howard, 363). This contract may, therefore, be laid out of view. It is no impediment to the assertion of the complainant's rights, whatever they may be. It does not in any wise affect them.

The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that

Marks v. *Pell*, 1 J. Ch. R. 594; *Horn* v. *Ketcltas*, 46 N. Y. 605). A conveyance absolute in terms given as a security is a mortgage with all the incidents of a mortgage, and the rights and obligations of the parties to the instrument are the same as if the deed had been subject to a defeasance expressed in the body of the instrument or executed simultaneously with it (4 Kent's Com., *supra*). It must be recorded as a mortgage and not as a deed. *Dey* v. *Dunham*, *supra*. This case was reversed in 15 Johnson's Reports, 555, but this principle was recognized by the appellate court that reversed the decree of the chancellor. The reversal was on the ground that the subsequent purchaser claiming adversely to the deed was not a purchaser in good faith, and so not within the protection of the recording acts (*James* v. *Johnson*, 6 J. Ch. R. 417; 2 Cow. 249). In *White* v. *Moore*, 1 Paige, 551, the chancellor held that the fact that there was no defeasance in writing did not take the instrument out of the effect of the statute requiring all mortgages to be recorded as mortgages.

The estate remaining in the mortgagor after the law day has passed, before foreclosure, is popularly but erroneously called an equity of redemption, retaining the name it had when the legal estate was in the mortgagee and the right to redeem existed only in equity. Although a misnomer, it does not mislead. The legal estate remains in the mortgagor and is subject to dower and curtesy, to the lien of judgments, may be sold on execution and may be mortgaged or sold as any other estate in lands, while the mortgagee has but a lien upon the lands as a security for his debt, and the land is not liable to his debts, or subject to dower or curtesy, or any of the incidents of an estate in lands (2 Wash. R. P. 152 and *seq.*; *Jackson* v. *Willard*, 4 J. R. 41; Powell on Mortgages, 258, N. L.). The mortgagor is possessed of an estate in the land in virtue of his former and original right, and there is no change of ownership. So far as the entire estate is concerned there is but one title, and this is shared between the mortgagor and mortgagee, the one being the general owner and the other having a lien which, upon a foreclosure of the right to redeem, may ripen into an absolute title, their respective parts when united constituting one title. A mortgagor and mortgagee may at any time after the creation of the mortgage and before foreclosure make any agreement concerning the estate they please, and the mortgagee may become the purchaser of the right of redemption. A transaction of that kind is, however, regarded with jealousy by courts of equity, and will be avoided for fraud, actual or constructive, or for any unconscionable advantage

taken by the mortgagee in obtaining it. It will be sustained only when *bona fide;* that is, when in all respects fair and for an adequate consideration (*Trull* v. *Skinner*, 17 Pick. 213; *Patterson* v. *Yeaton*, 47 Maine, 306; *Ford* v. *Olden*, L. R. 3 Eq. Cases, 461; *Kaldridge* v. *Gillespie*, 2 J. Ch. R. 30; Wash. on Real Prop., ch. 16, § 1, pl. 24).

The defendant claims to have extinguished the right of redemption and acquired the entire estate by the payment of the fifty dollars and in virtue of the written acknowledgment of its payment for the purposes named in it. The paper is in its terms ambiguous. It does not purport to convey or transfer any property or estate in lands, but is declared to be in full of all claims and demands whatsoever as to conveyance of property or otherwise. It is but a parol admission of a satisfaction for the right mentioned. The apparent meaning of the instrument is to admit a satisfaction of all claims against the defendant, claims and demands that may be enforced whether such claims are of a right to a conveyance of property or any other matter. The plaintiff required no conveyance of the lands from the defendant. Upon the payment of the mortgage debt he would have been reinvested with the unincumbered title without conveyance or release from the defendant. As evidence of his title he might have required a reconveyance or a satisfaction of the mortgage, and that the courts would have compelled. But his right of redemption was not in any sense a "claim or demand as to conveyance of property or otherwise." The receipt had, upon its face and without explanation, respect to personal claims and demands against the defendant. But the transaction was explained upon the trial and shown to have been intended as a full settlement of all claims of the plaintiff to the lands and premises and of all claims to a reconveyance thereof. If this payment and receipt did operate to change the nature of the deed from a mortgage to an absolute conveyance, and is a release of the right to redeem so that the mortgagee became seized in fee simply by a union of the estates of the mortgagor and mortgagee discharged of the mortgage, the defence to the action is perfect. It cannot be claimed that the written paper *ex proprio vigore* could have that effect. It does not profess to release the right of redemption or to convey any lands or interest in lands. No lands in particular are referred tc. No agreement can be spelled out of the instrument which could be specifically performed, and it could not be aided and made a perfect contract to release or convey lands by parol proof. The whole force of the transaction, as affecting the rights of the plaintiff, is in

Broad and Taylor Pritchard advancing to the said John Selfe the sum of £200 upon the security of a piece or parcel of land known as 'The Park,' Surbiton Hill, &c., the said John Selfe hereby authorizes and instructs the said Peter Broad and Taylor Pritchard to sell and dispose of the whole or any portion of the land as above named, either by private or public sale, at and for the best price that can be obtained; and further, to repay themselves out of the proceeds of such sale the said sum of £200, with interest at the rate of 5 per cent. per annum from the date hereof, with a commission of 5 per cent. on the amount realized, and the expenses attending the sale thereof; and in the event of the said John Selfe repaying the said Peter Broad and Taylor Pritchard the aforesaid sum of £200 and interest, the said John Selfe shall pay to the said Peter Broad and Taylor Pritchard a commission of 5 per cent. on the value of the said property, together with all the expenses incurred by them, whether the property or any portion thereof is sold by any other agency or retained by the said John Selfe. The said John Selfe further undertakes to execute a legal mortgage of the above-mentioned lands and buildings to the said Peter Broad and Taylor Pritchard at his own expense whenever called upon by them so to do, such mortgage to contain all the usual and customary covenants, and particularly power of sale, either by private contract or public auction."

The plaintiffs, in pursuance of the authority given to them by the agreement, made all the necessary arrangements for proceeding to a sale of the premises mentioned in the Memorandum, and in so doing incurred considerable expense; but in February, 1862, the defendant gave the plaintiffs notice that he revoked the authority so given, and the premises were accordingly not sold. The value of the property was about £8,000. The plaintiffs applied to the defendant for payment of the principal, interest, and 5 per cent. commission (£400), and expenses, which they alleged to be due to them; but the defendant declined to recognize their claim to the 5 per cent. commission, and in March, 1862, the defendant tendered to the plaintiffs the sum of £200 and interest, and £15 for any expenses the plaintiffs might have incurred in the matter.

The present suit was afterwards instituted, and the cause now came on upon motion for decree.

The Master of the Rolls [Lord Romilly] said the contract in this case was only a contract of mortgage to the extent of £200 principal, and the interest upon it; but not beyond this. His

Honour thought that the cases referred to by Mr. Roberts, and several others which he had consulted, showed the principle that the Court would not permit a person, under the colour of a mortgage, to obtain a collateral advantage not belonging or appurtenant to the contract of mortgage. Although this principle, in its origin, probably had reference to the usury laws, it went, in his Honour's opinion, beyond them, and was not affected by their repeal. The remedies of foreclosure and redemption were co-extensive, and it was clear that if the mortgagor had come to redeem the security, he would have been allowed to do so on payment of the principal sum of £200, interest, and costs, and then his Honour would have had to consider whether, under the recent Act of Parliament, the Court could not direct an inquiry as to what was properly due to the mortgagees in respect of services rendered as to the property under the agreement entered into between them and the mortgagor. The case was the same in foreclosure. Therefore, in making the usual foreclosure decree, his Honour proposed to direct a reference to chambers, to inquire what (if anything) was due to the plaintiffs in respect of expenses and services rendered by them under the agreement. With regard to the question of costs, generally speaking, in foreclosure suits, the mortgagee added his costs to his security; but it was equally clear that where the mortgagor had tendered his mortgage-money and interest prior to the suit, if the mortgagee came to foreclose, he must pay the costs of the suit. Here, no doubt, a tender had been made of the £200 principal and interest, and £15 for expenses, which the plaintiffs did not consider enough, and refused to accept. It was, however, to be remembered that the defendant had entered into this contract with the plaintiffs to pay them a commission with his eyes open; and, although this was a contract which the Court could not enforce by reason of want of mutuality—the Court not being able to compel the plaintiffs to perform the sevices required by the agreement—yet, as the defendant entered into this contract, he could not claim the same benefit from the tender which he might have done in a case of ordinary mortgage. The Court, therefore, could not give him the costs of the suit. Neither were the plaintiffs entitled to the costs of the suit, because they did not come simply to enforce a mortgage security, but they came to enforce what the Court considered they were not entitled to enforce. There would, accordingly, be no costs on either side up to the hearing. An account would be directed of what was due to the plaintiffs for the principal sum of £200 and interest at £5 per cent., and the

establish that the mortgagee shall not impose on the mortgagor an unconscionable or oppressive bargain. The present appears to me to be a reasonable trade bargain between two business men who enter into it with their eyes open, and it would be a fanciful doctrine of equity that would set it aside.

It is unnecessary to say more: the covenant in this case is not avoided by any such supposed rule of equity as has been contended for.

COLLINS, L. J. I am of the same opinion. Apart from authority, no one would say that this stipulation was invalid, for it seems a reasonable and businesslike one. But it is said that mortgages are subject to a long series of decisions, and no doubt equity judges have tried to lay down some principle which would explain satisfactorily the decisions of their predecessors and account for their own, but in so doing they have sometimes laid down principles which, when applied to other cases, are too wide. The fact is that those decisions were given in particular hard cases, and judges have afterward endeavored, not always successfully, to reduce them to a general rule.

On what principle can any stipulation in a mortgage deed which does not fetter the right of redemption be held invalid? I think only on the general principle that effect will not be given to what is unconscientious and oppressive. No narrower principle will work. Here the provision is reasonable and does not fetter the equity of redemption. The wide proposition in *Jennings* v. *Ward*, 2 Vern. 520, was not necessary for the decision in that case, and there is nothing in this case to bring it within that decision. The mere fact that a stipulation for the benefit of the mortgagee is contained in the mortgage deed does not necessarily make that stipulation invalid.

SANTLEY *v.* WILDE, [1899] 2 Ch. 474.—The plaintiff, Miss Kate Santley, being the sub-lessee of the Royalty Theatre, and having an option to acquire the reversion of the head-lease on paying £2000 within a limited time, borrwed that sum of the defendant, S. J. Wilde, on the terms of the loan being repaid with six per cent. interest and secured by a legal mortgage, which was also to provide for payment to said Wilde of one-third of the clear net profit rental of the theatre. The mortgage, executed in pursuance of the agreement, was for the whole of the term acquired by the plaintiff, less

one day, and contained a covenant by her for repayment of the £2000 by twenty quarterly instalments of £100 each, and also a covenant to pay the one-third of the profit rental during the whole of the mortgagor's term, although the £2000 and interest should all have been paid. The property was redeemable only on the payment of £2000 and interest, and all other moneys covenanted to be paid. Some of the instalments being in arrears, defendant gave plaintiff three months' notice to pay off all the principal moneys and interest secured by the mortgage. Plaintiff paid the instalments in arrear, and within the three months tendered the balance of the £2000, with interest to the end of the three months and the costs, but Wilde refused to accept the money.

Plaintiff then brought the present action, claiming (1) a declaration that the mortgage ought to stand as a security for the £2000, or so much thereof as remained owing, with interest, and that so far as the same deed provided for payment to the defendant of a share of the rents and profits, or precluded the plaintiff from redeeming on payment of principal and interest, such deed was invalid and not binding on the plaintiff; (2) redemption and reconveyance.

The defendant counter-claimed for (1) a declaration that during the residue of the leasehold term, notwithstanding that all the principal and interest had been paid, he was entitled to be paid one-third of the clear net profit rental; (2) an account of what was due on the footing of that declaration.[1]

Lindley, M. R. The question raised on this appeal is extremely important: I do not profess to be able to decide it on any principle which will be in harmony with all the cases; but it appears to me that the true principle running through them is not very difficult to discover, and I think that it can be applied so as to do justice in this case and in all other cases on the subject that may arise. The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and

[1] This statement of facts is abbreviated from the report of the case in the court below: [1899] 1 Ch. 747.

tice by either party. 2. That the defendant should have as security 30,000*l.* of the company's first mortgage debenture stock transferred to him. 3. That the directors of the company should elect a nominee of his on their board. 4. That the defendant should have the option of purchasing the whole or any part of such stock at 40 per cent. at any time within twelve months. 5. That he should have a further option, namely, in the event of the company at any time raising further capital or selling its undertaking for shares or stocks of another company, the defendant should have the option of underwriting the taking up of such new capital, or shares, or stocks at a commission of 10 per cent.

The first question is, What is the true nature of this agreement? Is it a mortgage with an option to purchase, or is it a conditional sale? Or is it an agreement giving Samuel an option to hold the debenture stock as a mortgage or a purchase? It appears to me to be clearly a mortgage with an option to purchase. A loan of 5000*l.* on security was what the company wanted, and what Samuel agreed to let the company have on terms. They were not bargaining for anything else. As soon as the 5000*l.* was advanced and the debenture stock was placed at Samuel's disposal he was in the position of mortgagee of that stock. He had the rights of a mortgagee, and the company had the rights of a mortgagor. There was that reciprocity and mutuality of remedies which distinguish a mortgage transaction from a conditional sale and from other transactions more or less resembling a mortgage, but not really constituting a mortgage. The transaction was in my opinion a mortgage, plus, amongst other things, an option to purchase, which if exercised by the mortgagee would put an end to the mortgagor's right to redeem—i. e., would prevent him from getting back his mortgaged property. This was the view taken by KEKEWICH, J., and by all the members of the Court of Appeal, and I am unable myself to view the transaction differently.

In *Lisle* v. *Reeve*, [1902] 1 Ch. 53, at p. 68, BUCKLEY, J., suggested some instances in which he considered a mortgagee might validly stipulate for an option to buy the equity of redemption; but although his decision was affirmed first by the Court of Appeal and afterwards by this House (*Reeve* v. *Lisle*, [1902] A. C. 461), the affirmance proceeded entirely on the fact that the agreement to buy the equity of redemption was no part of the original mortgage transaction, but was entered into subsequently, and was an entirely separate transaction to which no objection could be taken.

It is plain that the decision would not have been affirmed if the agreement to buy the equity of redemption had been one of the terms of the original mortgage. 2 W. & T., 7th ed., p. 16. The Irish case *Re Edward's Estate*, (1861), 11 Ir. Ch. Rep. 367, is to the same effect.

I cannot help thinking that both parties intended that the two options to purchase the 30,000*l.* debenture stock and to underwrite further capital or debenture stock if issued were to be exercisable even after payment off of the 5000*l.* But the decisions of this House in *Noakes* v. *Rice*, [1902] A. C. 24, and *Bradley* v. *Carritt*, [1903] A. C. 253, conclusively shew that, whatever might have been intended, Samuel could not have been entitled to exercise either option after repayment of his loan. But these decisions and the previous decision of *Salt* v. *Northampton*, [1892] A. C. 1, emphatically recognize the old doctrine, "Once a mortgage always a mortgage," which is too well settled to be open to controversy. Lord Hardwicke said in *Toomes* v. *Conset*, 3 Atk. 261: "This Court will not suffer in a deed of mortgage any agreement in it to prevail that the estate become an absolute purchase in the mortgagee upon any event whatsoever." But the doctrine is not confined to deeds creating legal mortgages. It applies to all mortgage transactions. The doctrine "Once a mortgage always a mortgage" means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid, and is inconsistent with the transaction being a mortgage. This principle is fatal to the appellant's contention if the transaction under consideration is a mortgage transaction, as I am of opinion it clearly is.

Then it was contended that, as the property mortgaged was debenture stock issued by a limited company, the case did not fall within the principle to which I have been referring. I confess my inability to follow the argument on this point. Debenture stock is usually a sum of money charged on the assets of the company issuing it. It may be redeemable or irredeemable, in which case it is not a mortgage at all. But whether redeemable or irredeemable, it is capable of being made a security for money lent upon it. It can be mortgaged as well by the company which issues it as by an ordinary holder. I can discover no reason for treating a mortgage of debenture stock as something so different from other mort-

KREGLINGER *v.* NEW PATAGONIA MEAT AND COLD STORAGE COMPANY, LTD.

HOUSE OF LORDS, 1913

(*L. R.* [1914] *A. C.* 25)

APPEAL from an order of the Court of Appeal affirming an order of SWINFEN EADY, J.[1]

VISCOUNT HALDANE, L. C. My Lords, the appellants are a firm of merchants and woolbrokers. The respondents carry on the business of preserving and canning meat and of boiling down the carcases of sheep and other animals. In the course of this business they have at their disposal a large number of sheepskins. It appears that in the summer of 1910 the respondents were desirous of borrowing 10,000*l.*, and requested the appellants to advance that sum. The appellants, who were desirous of obtaining an option to purchase for a term of five years all the sheepskins at the respondents' disposal, agreed to lend the money in consideration of being given such an option. The negotiations which followed resulted in an agreement dated August 24, 1910. Under this agreement the appellants were to lend the respondents the sum of 10,000*l.* repayable on demand with interest at 6 per cent. If, however, among other conditions to be observed, the interest was duly paid, the appellants were not to demand repayment till September 30, 1915, but the respondents were to be at liberty to pay off the loan earlier. To secure the loan the respondents by the agreement charged their undertaking and all their property, both present and future, with the payment of the principal sum and interest to the intent that the charge should be a floating security on the undertaking and property, but so that the respondents should not create any mortgage or charge in priority without the appellants' consent, or without such consent sell their farms or lands. The principal sum was to be made payable in certain prescribed events. By clause 8 of the agreement the respondents were not for five years from the date of the agreement (i. e., till August 24, 1915) to sell sheepskins to any one excepting the appellants, so long as the latter were willing to buy at a price equal to the best

[1] Statement abridged. Concurring opinions of the EARL OF HALSBURY and of LORDS ATKINSON and MERSEY omitted. Portions of the opinions of VISCOUNT HALDANE, L. C., and of LORD PARKER are omitted.

price (c. i. f. London) offered by any one else, and the respondents were to pay to the appellants a commission of 1 per cent. on the sale price of all sheepskins sold by the respondents to any one else.

My Lords, the respondents have now, as they were entitled to do under the agreement, paid off the loan. They claim that such payment has put an end to the option of the appellants to buy the respondents' sheepskins. Under the terms of the agreement this option, as I have already stated, will, if it is valid, continue operative until August 24, 1915. What the respondents say is that the stipulation is one that restricts their freedom in conducting the undertaking or business which is the subject of the floating charge; that it was consequently of the nature of a clog on their right to redeem and invalid; and that, whether it clogged the right to redeem or was in the nature of a collateral advantage, it was not intended and could not be made to endure after redemption. The appellants, on the other hand, say that the stipulation in question was one of a kind usual in business, and that it was in the nature not of a clog but of a collateral bargain outside the actual loan, which they only agreed to make in order to obtain the option itself. They further say that even if the option could be regarded as within the doctrine of equity which forbids the clogging of the right to redeem, that doctrine does not in a case as this extend to a floating charge.

The controversy which has thus arisen was brought before Swinfen Eady, J., on a motion for an interlocutory injunction to restrain the respondents from selling sheepskins to any one else than the appellants. The learned judge refused this motion on the ground that the point had been settled adversely to the appellants by decisions of your Lordships' House. The case was brought formally before the Court of Appeal, but was disposed of there without argument with a view to taking the point as speedily as possible before your Lordships for review.

My Lords, before I refer to the decisions of this House which the Courts below have considered to cover the case, I will state what I conceive to be the broad principles which must govern it.

The reason for which a Court of Equity will set aside the legal title of a mortgagee and compel him to reconvey the land on being paid principal, interest, and costs is a very old one. It appears to owe its origin to the influence of the Church in the Courts of the early Chancellors. As early as the Council of Lateran in 1179, we find, according to Matthew Paris (Historia Major, 1684 ed. at pp. 114–115), that famous assembly of ecclesiastics condemning usur-

has really been an attempt to effect a mortgage with a provision preventing redemption of what was pledged merely as security for payment of the amount of the debt and any charges besides that may legitimately be added. It is not, in my opinion, conclusive in favour of the appellants that the security assumed the form of a floating charge. A floating charge is not the less a pledge because of its floating character, and a contract which fetters the right to redeem on which equity insists as regards all contracts of loan and security ought on principle to be set aside as readily in the case of a floating security as in any other case. But it is material that such a floating charge, in the absence of bargain to the contrary effect, permits the assets to be dealt with freely by the mortgagor until the charge becomes enforceable. If it be said that the undertaking of the respondents which was charged extended to their entire business, including the right to dispose of the skins of which they might from time to time become possessed, the comment is that at least they were to be free, so long as the security remained a floating one, to make contracts in the ordinary course of business in regard to these skins. If there had been no mortgage such a contract as the one in question would have been an ordinary incident in such a business. We are considering the simple question of what is the effect on the right to redeem of having inserted into the formal instrument signed when the money was borrowed an ordinary commercial contract for the sale of skins extending over a period. It appears that it was the intention of the parties that the grant of the security should not affect the power to enter into such a contract either with strangers or with the appellants, and if so I am unable to see how the equity of redemption is affected. No doubt it is the fact that on redemption the respondents will not get back their business as free from obligation as it was before the date of the security. But that may well be because outside the security and consistently with its terms there was a contemporaneous but collateral contract, contained in the same document as constituted the security, but in substance independent of it. If it was the intention of the parties, as I think it was, to enter into this contract as a condition of the respondents getting their advance, I know no reason either in morals or in equity which ought to prevent this intention from being left to have its effect. What was to be capable of redemption was an undertaking which was deliberately left to be freely changed in its details by ordinary business transactions with which the mortgage was not to interfere. Had the charge not been a floating one it might have been more

difficult to give effect to this intention. In *Noakes & Co.* v. *Rice*, [1902] A. C. 24, this difficulty is illustrated, for the House held that what had been inserted in the shape of a covenant by the mortgagor to buy the beer of the mortgagee after redemption of the public-house mortgaged was really a term of the mortgage and was inoperative as being, not merely a collateral agreement, but in truth a restriction on the right to get back the security free from the terms of the mortgage. That was the case of the mortgage of a specific property. The decision that the transaction was what it was held to be is at all events readily intelligible. In *Bradley* v. *Carritt*, [1903] A. C. 253, it was decided that the mortgagor of shares in a tea company who had covenanted that he would use his best endeavours to secure that always thereafter the mortgagee should have the sale of the company's tea had permanently fettered himself in the free disposition and enjoyment of the shares. It was held that though the covenant did not operate in rem on the shares it amounted to a device or contrivance designed to impede redemption. The decision was a striking one. It was not unanimous, for Lord Lindley dissented from the conclusions of Lord Macnaghten and Lord Davey. It is binding on your Lordships in any case in which the transaction is really of the same kind, although it does not follow that all the dicta in the judgment of those of your Lordships' House who were in a majority must be taken as of binding authority. And it certainly cannot, in my opinion, be taken as authoritatively laying down that the mere circumstance that after redemption the property redeemed may not, as the result of some bargain made at the time of the mortgage, be in the same condition as it was before that time, is conclusive against the validity of that bargain. To render it invalid the bargain must, when its substance is examined, turn out to have formed part of the terms of the mortgage and to have really cut down a true right of redemption. I think that the tendency of recent decisions has been to lay undue stress on the letter of the principle which limits the jurisdiction of equity in setting aside contracts. The origin and reason of the principle ought, as I have already said, to be kept steadily in view in applying it to fresh cases. There appears to me to have grown up a tendency to look to the letter rather than to the spirit of the doctrine. The true view, is, I think, that judges ought in this kind of jurisdiction to proceed cautiously, and to bear in mind the real reasons which have led Courts of Equity to insist on the free right to redeem and the limits within which the purpose of the rule ought to confine its

expressly stipulated for in the mortgage to be paid on a contingency, which is admitted to have happened."

The verdict was for $14,862.40, which included interest and the five per cent. commission. After judgment the defendants took this writ and assigned for error the refusal of the foregoing points and the portion of the charge noted.

Chief Justice Sharswood delivered the opinion of the court March 17th, 1879.

In *Huling* v. *Drexel*, 7 Watts, 126, it was decided by this court that a stipulation in a mortgage that, in the event of the necessity of proceeding to recover the mortgage by suit, the mortgagee shall be entitled, in addition to the debt and interest, to damages for cost and expenses incident thereto, was not usurious, and might be enforced in the *scire facias*. In consequence of this decision, it has become common to insert a provision not only in mortgages, but notes and other instruments for the payment of money, that the creditor, in the event of being obliged to resort to a suit, shall recover a certain percentage as commissions to the attorney who is retained by him to collect the debt. This commission, it has been held, does not belong to the attorney, but to the creditor. It cannot be collected as costs, but must be included in the judgment (*Mahoning County Bank's Appeal*, 8 Casey, 158; *McAllister's Appeal*, 9 P. F. Smith, 204; *Faulkner* v. *Wilson*, 3 W. N. C. 339; *Schmidt & Friday's Appeal*, 1 Norris, 524). In *Robinson* v. *Loomis*, 1 P. F. Smith, 78, it was ruled that such commission was not a penalty, but an agreed compensation to the mortgagee for expenses incurred by the default of the mortgagor.

It is undoubtedly true that the parties to a contract may lawfully agree that the damages in case of a breach shall be liquidated at a certain amount. Equity will not relieve against such a contract fairly entered into, unless it is evidently a penalty. This principle of liquidated damages is not applicable, however, to a contract for the loan of money—at least such stipulation is subject to the control of courts of equity. As in the days of Solomon, "the borrower is servant to the lender," and courts of equity from the earliest period have assumed the jurisdiction of relieving the borrower from unreasonable and oppressive stipulations, exacted from his necessities, altogether apart from the statutes against usury. Especially has this always been the case as to mortgages. Agreements embarrassing or restraining the equity of redemption have invariably been set aside. The stipulated commission for

the attorney may be so far beyond the ordinary rate charged for such services as to require imperatively the interposition of the equitable powers of the court. Equity has always been a part of the law of Pennsylvania. In the administration of equitable principles it is the court and not the jury who exercise the functions of the chancellor, even where the action is in the common-law form. The jury, like the same tribunal in an issue directed by the chancellor, decide disputed facts; but it is the court that must be satisfied and apply the equity on the facts found or undisputed. If they think an equitable title to relief not made out by the proofs, it is their duty so to direct the jury, and *contra* if they think the equity has been established. These rules are so familiar and well settled that it would be a work of supererogation to cite the numerous cases which support them.

We think these principles apply to the questions raised upon this record. The lender of money on any species of security cannot exact an unreasonable stipulation in the shape of an agreed liquidation of damages. Equity interposes her shield to protect the borrower. The debtor in cases of this kind will readily yield to the demand of the creditor, as he would be apt to regard collection by suit as a remote and improbable contingency. Even at law what is reasonable is often, indeed, a question of fact, but in many cases it is a pure question of law. Thus, notice of the non-payment of a promissory note, though it was at first submitted to the jury to decide whether it was within reasonable time, is now unquestionably the exclusive province of the court; so it is now held that after a lapse of seven years an abandonment of a title by settlement is a conclusive presumption of law. No court has ever thought of sending an issue to a jury to determine what is reasonable compensation to trustees. They would be a tribunal entirely unsafe to intrust with such a question. These decisions have been reached by the necessity of certainty in the rules in such cases. Many other illustrations could be given. It is important, unless we are prepared to say that the lender may stipulate for any amount as commissions for the collection of his debt, that there should be some more certain rule than could be reached by submitting every case to a jury. It would practically in a great number of cases have the effect of destroying the stipulation altogether. If the question must in every case be referred to a jury, the creditor will abandon the claim sooner than encounter the delay and the risk of a very small sum being allowed. The court, from practical knowledge of professional work, are able to say in every particular

ment of the mortgage debt only, no matter to what amount, on other accounts, he may stand indebted to the mortgagee. And it is equally clear that if a subsequent mortgagee or judgment creditor file a bill to redeem, he will be permitted to do so upon the payment of the mortgage debt alone. Whilst these well settled principles of equity remain unshaken, upon no system of analogy or consistency can the claim of the appellants be gratified. Their doctrine is in effect simply this, that in all cases where the sale of the real estate of a deceased debtor is decreed, the debts due to the heirs at law to whom such estate has descended, be their nature what they may, must first be paid, even to the exclusion of judgment creditors. To such a length the doctrine of tacking has never yet been carried.[1]

[1] "There is no doubt as to the right of the plaintiff (mortgagor) to redeem the whole of the premises mortgaged; but as he who will have equity must do equity, it must be on condition not only of paying the sum charged upon the land, but the debt collaterally due to the mortgagee."—*Per* HOSMER, Ch. J., in *Scripture* v. *Johnson*, 3 Conn. 211 (1819). *Walling* v. *Aiken*, 1 MacM. Ch. 1 (1840); *Lake* v. *Shumate*, 20 S. C. 23 (1883); *Anthony* v. *Anthony*, 23 Ark. 479 (1861), and (*semble*) *Rowan* v. *Sharps Rifle Mfg. Co.*, 33 Conn. 28 (1865), *accord*.

The cases generally are *contra: Dorrow* v. *Kelly*, 1 Dall. (Penn.) 142 (1785); *Bridgen* v. *Carhartt*, 1 Hopk. Ch. (N. Y.) 234 (1824); *Presbyterian Corporation* v. *Wallace*, 3 Rawle (Penn.), 109, 155 (1831); *Bacon* v. *Cottrell*, 13 Minn. 194 (1868); *Mahoney* v. *Bostwick*, 96 Cal. 53 (1892); *Brooks* v. *Brooks*, 169 Mass. 38 (1897).

CHAPTER II *(Continued)*

Section V.—Mortgagee's Account

(a) Waste, Repair and Improvements

HANSOM *v.* DERBY

High Court of Chancery, 1700

(2 *Vern.* 392)

The bill being to redeem a mortgage, on the hearing an account was decreed and £240 reported due; to which report the plaintiff had taken exceptions. The cause thus standing in court, the Lord Keeper [Sir Nathan Wright], on a motion and reading affidavits that the defendant had burnt some of the wainscot and committed waste, ordered the defendant to deliver up possession to the plaintiff, who was a pauper, giving security to abide the event of the account.[1]

RUSSELL *v.* SMITHIES

Court of Exchequer, 1792

(1 *Anstr.* 96)

On a bill of foreclosure, it was referred to the Deputy Remembrancer to take account what the mortgagee had received from the rents, &c., or might have received, without wilful neglect in her. It appeared that the premises (malt house, etc.) had been allowed to fall so much out of repair that the rent fell from £22 to £18. Plaintiff had done some repairs and had held 40 years.

[1] "So, where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the court, on a bill brought by the mortgagor to stay waste and a certificate thereof, will grant an injunction."—*Per* Lord Ch. Hardwicke, in *Farrant* v. *Lovel*, 3 Atk. 723 (1750).

MICKLES *v.* DILLAYE

Court of Appeals of New York, 1858

(17 *N. Y.* 80)

Appeal from the Supreme Court. The action was for the redemption of certain premises in the city of Syracuse, mortgaged to Philo D. Mickles. The trial was before a referee, who found that the mortgaged premises were, in 1840, conveyed to Philo D. Mickles by one Fitch. There was then outstanding a mortgage upon the premises, executed by Fitch to David Hall. Philo D. Mickles conveyed to the plaintiff, with warranty, March 8th, 1841, for the price of $4000, to secure $2000 of which the plaintiff executed a mortgage, which in this suit he sought to redeem. This mortgage and the bond collateral thereto were, in April, 1841, assigned by Philo D. Mickles to John Townsend. Philo D. Mickles purchased the Fitch mortgage on September, 23d, 1843, and on the 6th of November, 1843, assigned it to John Townsend, without the knowledge or consent of the plaintiff, so far as the evidence showed. Townsend on the 23d of September, 1846, sold the premises to Charles A. Wheaton for $1750, upon a foreclosure of the Fitch mortgage, of which no notice was served on the plaintiff. At the time of this sale, Wheaton was the owner, by assignment from Townsend, of the mortgage for $2000, executed by the plaintiff to Philo D. Mickles. Wheaton took possession of the premises, and conveyed the same, with warranty, December 19, 1846, to John A. Robinson, who conveyed, November 19th, 1852, to Henry A. Dillaye, also with warranty. The only question in dispute in this suit was as to the allowance to be made to Dillaye for improvements after he took possession under the deed from Robinson; the effect of the purchase by Philo D. Mickles of the Fitch mortgage being the subject of litigation in another suit.

P. D. Mickles was in possession of the premises at the time he conveyed them to the plaintiff, and when he received the mortgage now sought to be redeemed. From that time until the sale under the attempted foreclosure he continued to rent them in his own name and to receive the rents, without disclosing the interest of the plaintiff. They were assessed to him. Wheaton, the purchaser, went into possession immediately after the sale, the tenants of P. D. Mickles attorning and paying the rent to him. P. D. Mickles, who was examined as a witness, testified that when he heard of

the sale, which he supposed was by virtue of the mortgage executed by the plaintiff, he told Wheaton he was very glad of it. He understood that the premises sold for enough to pay the mortgage, and he considered the matter settled, and that Wheaton had obtained a perfect title. The purchasers of the premises under Wheaton took possession at the time of their respective purchases. There was a brick building on the lot, which was erected by P. D. Mickles in 1842 or 1843. It was about nineteen feet wide, thirty-five feet long and two stories high. After Dillaye purchased, and in 1852, it was found that the old building was in a dilapidated condition, and was ready to fall down. The walls were badly cracked, particularly the one in the rear. It could have been repaired at an expense of about $250, by taking down the rear and one of the side walls and rebuilding them. Dillaye caused it to be rebuilt and enlarged, at an expense of about $5000, increasing its length to seventy feet, preserving one of the walls and the floors, and making use of the old materials so far as they would answer. He covered it with a tin roof, and put in gas and water pipes. He then rented it in its improved condition.

The referee found the foregoing facts in substance; and stated that the improvements made by Dillaye were permanent and valuable and were made by him in the full belief that he was the absolute owner of the premises. He added that it appeared from the evidence that while the improvements were making, the plaintiff was absent from the county of Onondaga and that there was no evidence that he was aware of the fact while the improvements were progressing. In matter of law he determined that the plaintiff was not obliged to allow anything on account of the rebuilding beyond what it would cost to repair the old tenement. He proceeded to state the account, charging the plaintiff with the mortgage debt and interest, the repairs estimated upon the principle above stated, premiums of insurance and taxes, and the interest on these last items, and crediting him with the rents received, but without including the increased rent on account of the rebuilding, and making due from the plaintiff, to be paid on the redemption, $1885.99. The defendants excepted. Judgment was rendered, allowing a redemption upon the payment of that sum according to the report, which was affirmed at a general term in the fifth district. The defendants appealed.

Denio, J. The right of a mortgagor who has made default in the payment of the mortgage debt according to his contract, and

there was no fraud or acquiescence on the part of the person having the legal title, he could not be compelled, even in favor of a party in possession who had made improvements *bona fide*, to allow for such improvements; but he said that such allowances were constantly made by courts of equity where the legal title was in the person who had made the improvements in good faith, and where the equitable title was in another, who was obliged to resort to the court for relief. This, as we have seen, is precisely the case now before the court.

In *Wetmore* v. *Roberts*, 10 How. Pr. R. 51, the question we are now considering was examined in the Supreme Court by Mr. Justice Hand, with his accustomed industry. It was a suit for foreclosure by a junior mortgagee, the defendant having purchased the premises from one who had bid them in upon a foreclosure of the elder mortgage, in which proceeding the junior incumbrancer was not made a party. It was alleged that the defendant had made improvements in good faith, of the value of $6000, and it was decided that the premises should be sold, and that the value of the permanent improvements as well as the amount due on the elder mortgage should be paid out of the proceeds; after which the plaintiff was to be paid the amount due on his mortgage. I refer to the authorities relied on by Judge Hand, and also to *Talbot* v. *Braddill*, 1 Vern. 184, and to Coote on Mortgages, pp. 392, 561.

I am clearly of opinion that the refusal to allow for the erection of the building was erroneous. The judgment of the Supreme Court should be reversed, as respects the account stated by the referee, and there should be a reference in that court to take an account between the plaintiff and the defendant Dillaye, in which the latter should be allowed for the enhanced value of the premises on account of the improvements made by the defendants. In other respects, the order should direct the usual allowances between mortgagor and mortgagee on a bill for redemption.[1]

Comstock and Pratt, Js., did not sit in the case; all the other judges concurring,

Judgment modified and account ordered to be re-stated.[2]

[1] Concurring opinion of Harris, J., omitted.

[2] "When, as in this case, a plaintiff has permitted his right to satisfy a mortgage to remain dormant for nearly thirty years, during which others have paid the assessments and taxes, and made improvements in the belief that they had title under a foreclosure of the mortgage, he cannot complain that, as a condition of regaining possession, he is compelled to account for and pay such taxes, assessments and for such improvements, according to the just and enlightened principles of courts of eq-

(b) *Rents and Profits—Annual Rests*

ANONYMOUS

HIGH COURT OF CHANCERY, 1682

(1 *Vern.* 45)

A MORTGAGEE shall not account according to the value of the land, viz. He shall not be bound by any proof that the land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so had it not been for his wilful default: as if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant that would have given so much for it.

HUGHES *v.* WILLIAMS

HIGH COURT OF CHANCERY, 1806

(12 *Ves.* 493)

EXCEPTIONS were taken by the defendant, a mortgagor, to the Master's report: first, that the Master had charged the plaintiff, a mortgagee in possession personally, and by a receiver under his appointment, with the rents actually received: whereas he ought to have been charged, according to the circumstances in evidence, with the improved rents, at which the estates had been since let by the receiver appointed by the Court, and which ought to have been obtained by the plaintiff, or his receiver, but for their wilful

uity."—*Per* GROVER, J., in *Miner* v. *Beekman*, 50 N. Y. 338, 345 (1872).

The doctrine of the leading case is everywhere accepted, the improvement being reasonable and "judicious." *Gillis* v. *Martin*, 2 Dev. Eq. (N. C.) 470 (1833); *McConnel* v. *Holabush*, 11 Ill. 61 (1849); *McSorley* v. *Larissa*, 100 Mass. 270 (1868); *Harper's Appeal*, 64 Penn. St. 315 (1870); *American Buttonhole Co.* v. *Burlington Loan Assn.*, 68 Iowa, 326 (1886). See, also, *McCumber* v. *Gilman*, 15 Ill. 381 (1854); *Morgan* v. *Walbridge*, 56 Vt. 405 (1883). But see *Miller* v. *Curry*, 124 Ind. 48 (1889), in which it is curiously limited, and compare *Barnett* v. *Nelson*, 54 Iowa, 41 (1880).

Valuable and lasting improvements *allowed out of the rents and profits* if made with the knowledge of mortgagor and without objection from him. *Montgomery* v. *Chadwick*, 7 Iowa, 114 (1858).

Morris under the above agreement expired and was extended one year. The money was not paid, but no further extension was given. It was claimed in behalf of plaintiff, that defendant held the farm as mortgagee in possession and was chargeable not only with the rents and profits actually received by him, but with the full rental value of the farm, which, it was alleged, had not been worked to its fullest capacity.

DANFORTH, J. An account rendered upon an application to redeem would properly charge the estate with the money advanced by Budlong and interest, with the expenses and compensation provided for by the agreement, and would credit the estate with whatever had been received from it by sales or rents and profits, as incident to the right of redemption, and as an equitable offset against the amount due on mortgage, after deducting taxes, repairs and other necessary expenses incurred on account of the estate. (*Ruckman* v. *Astor*, 9 Paige, 517.) It would include, therefore, the proceeds of timber sold and rents and profits actually received. That the farm was not worked to its fullest capacity furnishes no ground, under the circumstances of this case, for an enlarged liability. A provident owner might not do that, and there is no fact stated from which the wilful default of Budlong in this respect could be found. Nor has it been. He is in no sense a wrongdoer. He went into possession under the legal title, taken with the knowledge of Mrs. Morris and continued under circumstances which might well have induced a belief that he was in fact the owner of the estate, subject only to an agreement to sell. He was not technically at any time a mortgagee in possession. There was no mortgage. The character is cast upon him by the application of equitable rules to an oral agreement easily susceptible of two constructions, of which the one chosen is in direct contradiction of the written instruments which display his title, and he is therefore chargeable only with what he has received and not with what he might have received. "I think," says Lord Cranworth, in *Parkinson* v. *Hanbury*, 2 L. R. Engl. and Irish App. 1,[1] "that it is perfectly clear law that where a person becomes possessed of a property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default." In 1 Story Eq. Jur., s. 514*a*. (10th ed.) it is said:

[1] S. C., L. R. 2 H. L. 1 (1867).

"Where the estate is thrown upon one in the necessary enforcement of his legal rights, or comes to his possession as trustee, he should only be required to act in good faith and to account for what he in fact realizes;" and so in *Moore* v. *Cable*, 1 J. Chy. 384, Chancellor Kent directed the defendant to be charged only with rents and profits received. In Harper's Appeal, 14 P. F. Smith, 315, it is declared that "whatever the rule on accounting might be, where the party charged was a mortgagee under an ordinary formal mortgage, it ought not to be the same, when, by the express agreement of the party seeking equitable relief, he took and held possession as absolute owner." In the case before us there was not only a title taken by the defendant, by the plaintiff's wish, but there is alleged against it only an oral promise to convey at a certain time, upon payment of certain moneys, and no agreement to account in the meantime. There is nothing to show any want of good faith on the part of the defendant in his management of the property, nor that he did not act prudently and according to his best judgment in the matter. The omission of Mrs. Morris to redeem at the end of the time limited, the year, or at the end of the second year, her omission to arrange for further time to do so, the continued occupation of the premises by Mr. Budlong, apparently as owner, with no demand for an account of rents and profits—all bear upon this question, and, with the considerations before adverted to, show that the referee erred in measuring the profits for which Mr. Budlong was liable by the rental value of a farm worked to its full capacity rather than by what he actually received.[1]

Van Vronker *v.* Eastman, 7 Met. (Mass.) 157, 163 (1843). Shaw, C. J. The account must be reformed by making annual rests. 1. State the gross rents received by the defendant to the end of the first year. 2. State the sums paid by him for repairs, taxes, and a commission for collecting the rents,[2] and deduct the same from the gross rents, and the balance will show the net rents

[1] *Barnard* v. *Jennison*, 27 Mich. 230 (1873); *Hall* v. *Westcott*, 17 R. I. 504 (1891), *accord*.

[2] Such commissions are allowed in Massachusetts: *Gibson* v. *Crehore*, 5 Pick. 146, 161 (1827); *Gerrish* v. *Black*, 104 Mass. 400 (1870); and in Connecticut: *Waterman* v. *Curtis*, 26 Conn. 241 (1857). But this is exceptional, commissions being generally refused even where stipulated for: *Bonithon* v. *Hockmore*, 1 Vern. 316 (1685); *French* v. *Baron*, 2 Atk. 120 (1740); *Godfrey* v. *Watson*, 3 Atk. 517 (1747); *Clark* v. *Smith*, Saxt. (N. J.) 121, 137 (1830); *Harper* v. *Ely*, 70 Ill. 581 (1878); *Blunt* v. *Syms*, 40 Hun (N. Y.), 566 (1886). But see *Green* v. *Lamb*, 24 Hun, 87 (1881).

dant authority that when the owner of mortgaged property refuses or neglects to pay taxes and assessments, or liens of a like nature, which are imposed upon the mortgaged premises, the mortgagee has the right to pay the same in order to protect his security, and the amount so paid may be added to and become a part of the mortgage debt, which may be enforced upon a foreclosure of the mortgage.

Willard, in his work on Equity Jurisprudence, at page 446, lays down the rule that taxes paid may be added to the mortgage debt, and he adds, "so money paid by the mortgagee to redeem the premises from a tax sale becomes part of the mortgage debt in equity;" he further says at page 448, "with regard to the amount to be paid on redeeming, it may be said, that as taxes are a legal charge upon the estate, they may, if necessarily paid by the mortgagee, be added to the mortgage debt." The same rule is upheld in Thomas on Mortgages, at pages 86 and 276, and in Jones on Mortgages, at sections 77 and 1134. In the last authority it is laid down that this is so, although there be "no tax clause in the mortgage."

Numerous cases in the reports sustain this doctrine. (*Eagle Fire Ins. Co.* v. *Pell*, 2 Edw. Ch. 631; *Burr* v. *Veeder*, 3 Wend. 412; *Brevoort* v. *Randolph*, 7 How. Pr. 398; *Faure* v. *Winans*, Hopk. Ch. 283; *Marshall* v. *Davies*, 78 N. Y. 414; *Robinson* v. *Ryan*, 25 *id.* 320; *Williams* v. *Townsend*, 31 *id.* 414.) These cases are criticised by the counsel for the appellant, and it is claimed they do not sustain the doctrine contended for. While all of them do not entirely cover, yet they tend to the support of the principle that a mortgagee, who to save his mortgage and protect his security is under the necessity of paying the taxes and assessments to prevent the property from being sold, should be allowed for the same as a part of his mortgage debt upon the foreclosure of his mortgage. Whether the doctrine of tacking, as claimed by the counsel for the appellants, has any application, is not important to consider, if the principle we have stated can be invoked to save the mortgagee from the sacrifice of the property by reason of unpaid taxes or assessments. In accordance with the authorities already cited, it is not necessary that the premises should be sold prior to the payment of the taxes or assessments before the mortgagee is authorized to pay the same, and add the amount paid by him to his mortgage. (See *Eagle Fire Ins. Co.* v. *Pell*, and *Williams* v. *Townsend*, *supra*.)

The doctrine that neither the plaintiff nor his assignor could have any benefit from the doctrine of subrogation, because they voluntarily paid the taxes and were conspirators, cannot be upheld.

There is no finding in the case that either of them purchased the mortgage with the intent of paying the taxes and assessments so as to relieve the life estate and cast the burden upon the remaindermen; they were paid evidently in self-defense, and for the purpose of saving their liens as mortgagees. It cannot, therefore, be said that they were volunteers, or that they acted in bad faith as to others, or to any one who was under a legal necessity to make the payment, even if it may be urged that if the taxes had remained a lien, the life-tenant would have been obliged to pay them to prevent a sale of the property by the State or a return thereof, as that furnishes no reason why the plaintiff had not a perfect and complete right to protect his security from sale for the taxes. There is no rule by which the holders of the mortgage were obliged to delay the payment so as to compel the remaindermen to take action in regard to the same and relieve the property. They should have been vigilant in looking after their rights, and if they had done their duty the taxes would not have accumulated. Having failed to perform a plain duty, if they desired to protect the property against the taxes, after they have permitted the mortgagee to pay the taxes, they are in no position to object that it operates as a hardship upon them. They would have had an undoubted right to make application for the appointment of a receiver to collect the rents and apply them to the payment of the taxes. (*Cairns* v. *Chabert*, 3 Edw. Ch. 313; 1 Washburn on Real Prop. 97.)

In the case we are considering, the taxes remained unpaid from the year 1865 to the year 1872, and then again from 1872 to 1874, all inclusive. For eight years they were allowed to accumulate in the first instance, and afterward for three years, and during that period no effort was made to pay them, nor any attempt to compel the owner of the life estate to pay them, or the appropriation of the rents for that purpose. Here was a gross neglect which would have resulted in the sale of the property, and perhaps the destruction of the estate, but for the intervention of the owner of the mortgage.

Again, if the mortgagee or his assignee had the right to pay within the authorities to which we have referred, to protect his mortgage lien, any equity which might have existed between the life-tenant and the remaindermen cannot destroy or take away that right. The remainderman's rights and his interests are subject to the right of the mortgagee, which was a prior and superior right given by the mortgagor. If the mortgagor had survived, and the mortgagee had paid the taxes, the amount paid would clearly have

ant T. G. about 175 dollars, &c.; that the defendant occupied a small house and garden, and that the ejectment was brought for the house so occupied by the defendant T. G., but not for the cleared land.

THE CHANCELLOR [KENT]. The bill filed by the plaintiff is in the nature of a bill to redeem, and the plaintiff is entitled to redeem *the whole* of the premises contained in the lease, and to have the *entire* advantage of the new lease on such redemption. The renewed lease enures for the benefit of the mortgagor. According to the cases of *Manlove* v. *Bale*, and of *Rakestraw* v. *Brewer* (2 Vern. 84, 2 P. Wms. 511), the additional term comes from the same old root, and is subject to the same equity of redemption, otherwise hardship and oppression might be practised upon the mortgagor. It is analogous, in principle, to the case of a trustee holding a lease for the benefit of the *cestui que trust*. Courts of equity have said, that if he makes use of the influence which his situation enables him to exercise to get a new lease, he shall hold it for the benefit of the *cestui que trust*. (1 Dow. 269; 1 Ch. Cas. 191; 1 Bro. Ch. Cas. 198.) So, if a guardian takes a renewed lease for lives, the trust follows the actual interest of the infant, and goes to his heirs, or executor, as the case may be. (18 Vesey, 274.) Indeed, it is a general principle pervading the cases that if a mortgagee, executor, trustee, tenant for life, &c., who have a limited interest, gets an advantage by being in possession, "or behind the back" of the party interested in the subject, or by some contrivance in fraud, he shall not retain the same for his own benefit, but hold it in trust. (Lord Manners, in 1 Ball & Beatty, 46, 47; 2 Ball & Beatty, 290, 298.) The doctrine has been uniform from the decision of Lord Keeper Bridgman, above referred to, in 1 Ch. Cas. 191, down to the most recent decisions. Nor do I think that the agreement of August, 1809, ought to form an obstacle to the redemption of the whole. That agreement bears the mark of undue influence growing out of the first assignment; and contracts of that kind, made with the mortgagor, to lessen or embarrass the right of redemption, are regarded with jealousy, as they are very apt to take their rise in unconscientious advantages assumed over the necessities of the mortgagor. (1 Vern. 8; 2 Vern. 520; 2 Atk. 495; 2 Ball & Beatty, 278.) The general principle is, "once a mortgage always a mortgage;" and though, no doubt, the equity of redemption may be released upon fair terms, yet the fairness and value must distinctly appear. In this case there was no satisfactory consideration for an

abandonment by the plaintiff of one-half of his farm. The agreement was false on its face, for the consideration was not paid. A payment of the annual rent to the landlord was no compensation to the plaintiff for half of his farm; and if we can credit the subsequent declarations of the defendants, they regarded the *whole* farm as still subject to redemption. But without placing reliance on sayings of this kind, the paper itself, accompanied with the admission that the consideration was never paid to the plaintiff, is enough to justify me in not regarding that agreement as a valid obstacle to the original right of redemption.

I shall, therefore, direct a reference to a master to take and state an account between the parties, in which the plaintiff is to be charged with the 74 dollars and 12 cents mentioned in the original defeasance, with interest from that time, and is, likewise, to be charged with all sums of money justly due to the defendants for goods sold, or advances by them, or either of them, made to and for his use, and on his account; and that the plaintiff is to be credited with all payments made, or articles of produce delivered, or work, labor, and services rendered to the defendants, or either of them; and that the defendants are to be charged with the net yearly value of the premises possessed by them, or either of them, during the time of their possession, after deducting the rent and taxes accruing and paid during that period; and that the pleadings and proofs taken in the cause be received as evidence before the Master, and that the question of costs and all other questions be reserved until the coming in of the report.

Decree accordingly.

HYNDMAN *v.* HYNDMAN

Supreme Court of Vermont, 1845

(19 *Vt.* 9.)

Appeal from the Court of Chancery.

In 1832 the orator, being indebted to the defendant and William Hyndman, executed to them an absolute deed of his farm in Barnet and received back a writing of defeasance. The orator received farther advances from time to time, until 1836, when the parties reckoned together the amount due and found it to be $608.69, and then agreed that the defendant and William Hyndman should have the farm, free from the orator's equity of redemption, at eight

DAVIS, J. By the condition of the bond and mortgage the defendant undoubtedly had a right, after failure by the plaintiff to pay the taxes assessed on the mortgage premises, to pay and discharge the same, and thereupon to collect the amount so paid by suit upon the bond or by foreclosure of the mortgage. And the principal question in this case is, whether the purchase of the premises at the tax sales and the taking certificates of such purchase under the provisions of the charter of Buffalo, were a discharge of the assessments and taxes, within the true construction of the bond and mortgage.

By section 20 of title 5 of the charter of the city of Buffalo, as revised by the Laws of 1856, it is provided that the owner of any real estate sold for taxes may at any time before a declaration of sale is granted, as elsewhere provided by the charter, redeem the same by paying to the city treasurer, for the benefit of the holder of such certificate, the amount paid by him with the addition of fifteen per cent. per annum on such amount.

The certificates are transferable; and it cannot always be easily ascertained who the holder is. Hence the statute has provided that the redemption may be made by payment to the city treasurer. In all cases of sales for taxes the owner of the land is clothed by law with this right of redemption; and the tax, together with the expenses of the sale, remain a lien on the premises assessed, with an addition thereto of fifteen per cent., until the redemption or payment to the treasurer is made. The effect of the sale is therefore merely an assignment of the lien of the tax and the expenses then incurred, enchanced by the additional percentage; and this lien continues till the owner of the land makes the redemption, or the holder of the certificate takes title to the property in the prescribed form. It is therefore clear that the tax or assessment is not discharged by the sale and certificate. In this case the purchase at the tax sale was made by M. E. Viele, and the certificates of the comptroller were made to him, as he says, "for convenience of transfer." He was in fact the agent of defendant, but there was nothing in the manner of sale or form of the certificate to indicate that fact. The legal rights of the parties are perhaps the same as though the certificate had been made to the defendant; but it would certainly be very embarrassing to titles of real estate if the owner's right of redemption were dependent upon some undisclosed relation of agency between the apparent purchaser and the incumbrancer of the land. There would be no safety for him if he were not allowed to redeem; because the ostensible purchaser could

transfer the certificate to a *bona fide* holder and subject him to great embarrassment and perhaps to the loss of his land. A mortgagee who desires to pay off taxes or assessments and charge them on the mortgaged premises has a very plain course to pursue. At any stage of the proceedings he can step forward in his character of mortgagee and pay the assessment or redeem from a sale before the purchaser's title has actually ripened by a conveyance under the law. It is no hardship to require him to do this in a plain and distinct manner, so as not to embarrass the title of the mortgagor or owner. When, however, he purchases at a tax sale and takes a certificate as purchaser, that is an election on his part to occupy the relation of purchaser, with all the rights and incidents which the law attaches to it. He becomes then the owner of an undischarged lien, which the owner of the land may discharge in the manner provided by law.

But it is insisted that the purchase and taking of the certificate by a mortgagee, who has the right by the terms of his mortgage, or under the general statute, to pay off taxes and add the amount so paid to the lien of his mortgage, is by operation of law, *ipso facto*, an extinguishment and discharge of the tax. To support this proposition the familiar principle that a person who is placed in a situation of trust or confidence in reference to the subject of the sale, or has a duty to perform which is inconsistent with the character of a purchaser, cannot be a purchaser on his own account. (*Torrey* v. *The Bank of Orleans*, 7 Paige, 649; *Van Epps* v. *Van Epps*, 9 Paige, 257; *Burhans* v. *Van Zandt*, 3 Seld. 523.)

But this principle has never been carried so far as to prevent a junior mortgagee from purchasing the subject matter of the mortgage at a sale under a prior lien; nor has it been held that a title fairly purchased at such sale was held for the benefit of the mortgagor. A mortgage is a mere security for a debt; and there is no such relation of trust or confidence between the maker and holder of a mortgage as prevents the latter from acquiring title to its subject matter, either under his own or any other valid lien. The defendant had no duty to perform to the plaintiff or toward the mortgaged premises that precluded her from buying at the tax sale. She was under no obligation to pay the taxes. The plaintiff had covenanted that she might do so at her option, and thereby acquire certain rights; but she had not undertaken to do it nor subjected herself to any burthen or obligation whatever in respect to the assessments or taxes. She might pay them or not, as she chose, or she might stand upon her general rights and purchase at

judgment was unpaid; the sale was open and fair, and so far as appears was not procured by the intervention of Craig. The sum bid, so far as appears, was at the time the full value of the interest of Sanger in the property. There is nothing which in any manner tends to impeach the *bona fides* of the sale. It is claimed, however, that the redemption was void, on the ground that the judgment under which it was made had been paid by Stewart, the judgment debtor, before the redemption, and was not at the time a lien upon the land.[1]

The next and principal question to be considered is, whether Craig, at the time of the sale, occupied such a relation to the property, or to Stewart or Sanger, that he was disabled from purchasing for his own benefit, and claiming the title adversely to them. If he occupied that relation, he cannot set up any right acquired as purchaser on the sheriff's sale in bar of their right to redeem. Purchases by trustees, or persons occupying fiduciary positions, in contravention of their trust or duty, are held in equity to be made for the benefit of the *cestui que trust*, at his election. No irredeemable title can be acquired upon such a purchase. And if the purchase by Craig was within the principle which prohibits a purchase by a trustee, it is an immaterial circumstance that the time within which a statutory redemption might have been made has expired. The right of redemption exists in favor of the *cestui que trust* and those in privity with him, independently of the statute, upon general principles of equity, and may be enforced at any time within the period allowed by the statute of limitations, or the rule of courts of equity regulating the jurisdiction.

The rule which prohibits a trustee from purchasing the property of a *cestui que trust* stands upon the proposition stated by the chancellor in *Whichcote* v. *Lawrence*, 3 Ves. 740, that one who undertakes to act for another in any matter shall not in the same matter act for himself. It applies in all cases where the duty which the trustee has to perform in respect to the property is inconsistent with his becoming a purchaser for his own use. And the purchase will not be allowed to stand, although the court may not be able to discover any wrong intention on the part of the trustee, or that he has gained any advantage in the transaction. The rule is inflexible, that he shall not place himself in a position where his interest is or may be in conflict with his duty.

[1] The discussion of this point is omitted. The learned judge reaches the conclusion that no right of redemption remains in Stewart or his grantees.

It is claimed that Craig was disabled from purchasing the Congress Hall property at the sheriff's sale, and holding it adversely to Stewart and Sanger, under the rule just adverted to. There are two grounds upon which this claim is based: First, that Craig at the time was mortgagee in possession; and, second, that the relation of trustee and *cestui que trust*, in respect to the property, was created between Craig and Stewart by the instrument of April 24, 1860, which precluded him from purchasing for himself, or otherwise than as a trustee for Stewart, or his grantee. Assuming that the learned counsel for the plaintiff is correct in the position that Craig, at the time of the sheriff's sale, stood, in relation to the premises, in the character of mortgagee in possession, the question arises, whether a mortgagee in possession can buy the mortgagor's title on an execution sale, upon a judgment in favor of a third person against the mortgagor, and set up a title under the sale, as a defence to an action by the mortgagor to redeem. Another mode of stating the question is: Is a mortgage in possession a trustee for the mortgagor, so that he will not be allowed to buy in the equity of redemption on a sale upon an independent lien held by a third person?

Unless the mortgagee in possession is a trustee for the mortgagor, there is no ground upon which he can be precluded from purchasing. It is clear that no trust relation between the mortgagor and mortgagee is created by the execution of the mortgage, unaccompanied by possession. The mortgage under our law is a security merely. The mortgagee has, by virtue of his mortgage, no estate in or title to the land, or the right of possession, before or after the mortgage debt becomes due. He owes the mortgagor no duty to protect the equity of redemption. The power of sale which usually accompanies a mortgage is given to enable him, by an adverse proceeding, to sell the equity of redemption for the payment of the mortgage debt. The objection that he could not become the purchaser at his own sale under the power has been removed by the statute when the foreclosure is by advertisement (2 R. S. 546, § 7); and a provision is inserted in every decree for the sale of mortgaged premises, unless otherwise specially ordered, that the plaintiff may become the purchaser. (Rule 73.) And he may buy in any outstanding title and hold it against the mortgagor. (*Cameron* v. *Irwin*, 5 Hill, 280; *Williams* v. *Townsend*, 31 N. Y. 415; *Shaw* v. *Bunny*, 13 Week. R. 374; s. c., 2 De G., J. & S. 468.)

There is, in truth, no relation analogous to that of trustee and

life tenants, and tenants obligated by contract to pay the taxes, are incapacitated to become purchasers. The incapacity has likewise been held to extend to tenants in common, for, if the estate is sold for taxes to one of the tenants, it is sold for his default as well as for the default of his co-tenants. (*Page* v. *Webster*, 8 Mich. 263; *Butler* v. *Porter*, 13 Mich. 292; *Cooley* v. *Waterman*, 16 Mich. 366; Cooley on Taxation, 346, 347.) So a person who occupies a fiduciary relation as regards the estate, cannot purchase it for himself. The trust in the one-half of the mortgage for $3250 is protected under this rule. And there are cases which enounce, or at least presuppose, a still broader doctrine, which may be stated thus, namely: that a purchaser who has an interest in the estate, such as would entitle him to redeem it if sold to another, will be presumed to have purchased it for the protection of that interest, or to save it from sacrifice, and will be required to hold it, even after the statutory period for redemption has expired, simply as security for his reimbursement. We find this doctrine nowhere more clearly asserted than in *Fair* v. *Brown*, 40 Iowa, 209. The defendant there was interested in the estate by judgment lien and as a second mortgagee. He bought certificates of sale for taxes, and subsequently took the tax deed. The court held that the prior mortgage was not defeated. "The land," says the court, "is a common fund for the payment of the plaintiff's," *i. e.*, the prior mortgagee's, "mortgage and the defendant's liens. Defendant was authorized to redeem from the tax sale. Equity will not permit him to acquire the title for an inconsiderable sum when he was authorized to remove the trifling incumbrance by redemption. Though not bound to pay the tax, yet it was his right to do so to protect his liens. He cannot obtain that protection by pursuing a course that will deprive the mortgagee of his security, and leave the mortgagor to sustain the weight of the liens, which are personal judgments, after being deprived of his property by tax title. (*Garrettson* v. *Scofield*, 44 Iowa, 35; *Porter* v. *Lafferty*, 33 Iowa, 254; *Stears* v. *Hollenbeck*, 38 Iowa, 550.)" In *Middletown Savings Bank* v. *Bacharach*, 46 Conn. 571, the defendant, having had an undivided eighth of an estate subject to a mortgage set out to him under an execution, purchased the estate at a sale for taxes assessed before he became interested in it, and the court held that he could not set up the tax title to defeat the mortgage, he being entitled to redeem the mortgage, which yet he could not do, if the mortgagee had paid the taxes, without reimbursing him. The court also said that the mortgagee was similarly incapaci-

tated, because he could pay the tax and add the amount of it to the mortgage debt. In *Connecticut Mut. Life Ins. Co.* v. *Bulte*, 45 Mich. 113, the court lays down the doctrine that where a mortgagee, or one of two or more mortgagees, purchases the estate at a tax sale, the purchase may be treated as payment. "It is as just and as politic here," says the court, "as it is in the case of tenants in common, to hold that the purchase is a payment of the tax." In the later case of *Maxfield* v. *Willey*, 46 Mich. 252, the court affirms the doctrine. "When the mortgagee," says the court, "instead of making payment of the taxes, makes a purchase of the land at tax sale, we have no doubt of the right of the mortgagor to have the purchase treated as a payment, and to compel the cancelment of the certificate or deed on refunding the amount paid with interest." The opinions in these cases were delivered by Judge Cooley, who, in the preparation of his book on Taxation, had occasion to make the subject a special study.

The most recent case which we have met with is *Woodbury* v. *Swan*, 59 N. H. 22, in which the Supreme Court of New Hampshire decided that the holder of a mortgage cannot defeat a prior mortgage by acquiring a tax title. The court rest their decision on the following reasons, as declared by Bingham, J., in delivering the opinion of the court: "Mortgagor and mortgagee have a unity of legal interest in the protection of their titles against sale for the non-payment of taxes, and against outstanding tax titles; and it is not equitable that either of them should act adversely to the other in the acquisition and use of such titles. Therefore the mortgage contract comprises an implied agreement that, while either party may buy a tax title for the preservation of his right in the mortgaged property, neither of them will buy a tax title for the extinguishment of the title, in the maintenance of which they, as well as partners and tenants in common, are in law jointly concerned. The common interest of these parties in the mortgaged property creates a relation of trust and confidence."

Other cases may be cited which support the same view, though not always for the same reasons. (*Moore* v. *Titman*, 44 Ill. 357; *Harkreader* v. *Clayton*, 56 Miss. 383; *Haskell* v. *Putnam*, 42 Me. 244; *Bassett* v. *Welch*, 22 Wisc. 175; *Whitney* v. *Gunderson*, 31 Wisc. 359, 379; *Chickering* v. *Failes*, 26 Ill. 507; *McLaughlin* v. *Green*, 48 Miss. 175.) In California it is held that a person who is under any obligation, either *moral* or *legal*, to pay the taxes, cannot become a purchaser. (*Moss* v. *Shear*, 25 Cal. 38; *Christy* v. *Fisher*, 58 Cal. 256.)

justice of this case, as far as I am able to reach it in this suit, as it appears to me, is to consider the time of payment for the principal of the bond enlarged to the twenty-seventh of April next, leaving the interest payable half yearly. The contract made for complainant's enjoying the possession free of rent, is part of the one for releasing a portion of the lands, subsequently made with Mr. Rogers, and must be settled with that.[1]

DODGE *v.* CRANDALL

Court of Appeals of New York, 1864

(30 *N. Y.* 294)

Appeal from a judgment of the Supreme Court.[2]

Wright, J. The mortgage sought to be foreclosed by action was, in the winter of 1858–9, held by the administrator of S. V. R. Mallory, deceased. The premises covered by it had, after its execution, and about the 23d February, 1856, been conveyed by the mortgagor to the defendant Holcomb, who assumed the payment of the mortgage as a part of the purchase price of the premises. The mortgagor had paid the interest, and $266.66 of the principal sum secured by it, before the sale and transfer of the premises to Holcomb. Afterwards Holcomb paid the interest. The whole principal became due and payable on the 1st March, 1858. Shortly before the 28th February, 1859 (the administrator of Mallory being about to foreclose the mortgage), Holcomb entered into an agreement with the plaintiff's testator, whereby the latter agreed to purchase the mortgage of Mallory's administrator, who then held the same, and extend the time of payment five years, or give that additional time from the time he took the assignment, to pay the balance due upon the bond and mortgage; in consideration of which, Holcomb agreed to pay him fifty dollars, which he did pay, and Holberton took the assignment of the mortgage, and continued to hold the same, and receive payments of interest thereon up to

[1] See also, *Van Syckel* v. *O'Hearn*, 50 N. J. Eq. 173 (1892), where Bird, V. C., said: "The complainants say that the obligation being in writing and under seal, the time for the performance thereof cannot be enlarged by a parol agreement. I think all of the authorities, in this State at least, hold the time for performance of every such contract may be extended by parol."

[2] The statement of facts is omitted.

his death. The bond and mortgage were assigned to the plaintiff's testator on 28th February, 1859, and the time agreed to be given to Holcomb to make payment would not expire until the 28th February, 1864.

This foreclosure suit was brought in June, 1862, and the question is whether the executor of Holberton is entitled to sustain it, notwithstanding the contract of his testator to purchase the mortgage, and forbear foreclosing it for five years; or, in other words, to extend the time of payment of the debt secured to be paid by it, and which was due, for five years from such purchase. If Holberton, in the face of his contract, was not entitled to maintain an action to collect the principal secured by the mortgage by a foreclosure thereof before the five years elapsed, it is very clear his representative is not.

The ground taken at the trial was that the contract was void by the statute of frauds, not being in writing, and being an agreement that by its terms was not to be performed within one year from the making thereof. (2 R. S. 135, § 2, sub. 1.) I am of the opinion that it was not affected by the statute. The statute applies to executory, and not to executed contracts; and the one in question, I think, was of the latter description. It was certainly executed by Holcomb; and it seems to me the purchase of the mortgage by the plaintiff's testator was an execution on his part. Holberton agreed in substance to purchase the mortgage, and forbear to foreclose it for five years, in consideration of fifty dollars. He did purchase, and take an assignment of it, and Holcomb paid him the fifty dollars. Thus, the contract was fully executed. Nothing further remained to be done by either party. Holberton had simply to wait five years for his money. Holcomb had paid the consideration money, and Holberton had entered upon the contract by receiving the money and purchasing the mortgage, and neither party could rescind it. Neither could Holcomb recover back the money, nor Holberton refuse to carry out the contract, based as it was upon a good consideration, and which he had undertaken to execute.

The further point is now urged (although not alluded to on the trial), that the mortgage being a specialty, no agreement in regard to it could be valid unless the agreement was also a specialty. It may be conceded that ordinarily a sealed executory contract cannot be rescinded or modified by a parol executory contract; but that was not this case. Here the mortgage was due. The holder was about to enforce it by action; whereupon Holberton agrees, for

pay. The performance of an unqualified legal obligation by payment of part of a sum due upon a note is not a valid consideration for the extension of payment of the remainder." [1]

In *Parmelee* v. *Thompson*, 45 N. Y. 58, one of the makers of a promissory note after maturity paid to the payee a sum equal to the amount due thereon and took possession of the note. Subsequently he brought suit against another maker, who gave evidence tending to show that while the payee held the note an action was brought thereon in the Supreme Court, and that it was agreed between the defendants and the plaintiff therein that the suit should be discontinued, the defendant to pay the costs and have until the ensuing December to pay the note; that the costs were paid and the suit discontinued, after which the plaintiff became the owner of the note and brought the action before the expiration of the time agreed upon, and the trial judge held that there was no valid agreement to extend the time of payment. The judgment was affirmed in this court, the opinion being written by Judge Allen, in which he said: "It is competent for the parties, by a parol agreement, to enlarge the time of performance of a simple contract. . . . But a promise to extend the time of payment, unless founded on a good consideration, is void. A payment of a part of the debt, or the interest already accrued, or a promise to pay interest for the future, is not a sufficient consideration to support such promise." (Citing *Miller* v. *Holbrook*, *Gibson* v. *Renne* and *Kellogg* v. *Olmsted*, *supra*.)

Our attention has not been called to any authority in this court in hostility to the position taken in the decisions we have referred to. The reasons assigned by the learned justice who wrote for the Appellate Division, in favor of overthrowing the doctrine of these cases, while presented with marked ability and clearness, are not at all new. They were advanced in the dissenting opinion by Judge Davies in *Kellogg* v. *Olmsted*, *supra*, the first case in which the question received attention in this court, so far as we are advised. Whether the reasoning of the prevailing or dissenting opinion seems the better, it is not profitable to inquire, for the question was settled by the decision of this court, and has by later adjudications become so firmly grounded that it may not now be questioned.

The judgment should be reversed as to the defendants Henry A. and Brainard G. Latimer, and that of the Special Term modified

[1] The discussion of *Lowman* v. *Yates*, 37 N. Y. 601, and *Powers* v. *Silberstein*, 108 N. Y. 169, has been omitted.

by striking out the direction to the referee to pay costs to Brainard G. and Henry A. Latimer, and so further modified as to adjudge that the defendants, Frederick B. Latimer, Henry A. Latimer and Brainard G. Latimer, each pay to the plaintiff one-quarter of any deficiency that may arise on the sale of the mortgaged premises under said judgment, and as thus modified affirmed, with costs.

All concur.[1]

[1] But see, *contra*, *Benson* v. *Phipps*, 87 Tex. 578 (1895).

mortgage as not assigned. But this expression falls far short of an agreement that it was not to be assigned. It does not appear that the appellant had any rights prejudiced by the assignment of the mortgage; and it is impossible to evade the force of the fact of his depositing it in the respondent's hands. It speaks a language incapable of being misunderstood, and is decisive of the question. An issue to investigate the intention of the parties, on that act, would have been useless. I therefore think that the respondent had an equitable interest in the mortgage equivalent to the amount of the principal and interest of his note against Green.

Judgment of affirmance.[1]

WARDEN *v.* ADAMS

Supreme Judicial Court of Massachusetts, 1818

(15 *Mass.* 233)

This was a writ of entry by the said Warden, as assignee of a mortgage made by the said Adams to one John Earle.

The action came on for trial before the Chief Justice at the last April term in this county, and the parties agreed that the following facts should be considered as proved in the case, viz.: The said Adams made and executed the mortgage deed declared on, conditioned for the payment of six promissory notes made by the said John and one Lewis Adams, payable to the said Earle or his order. Afterwards the said Earle became insolvent, and from the 15th of November to the 5th of December, 1815, was in failing circumstances. Previously to the assignment hereafter mentioned Earle had pledged one of the said notes to a person not interested in this suit, but did not assign or deliver over to him the mortgage deed as security, and he afterwards redeemed the note, which he had since transferred to one Sewall Hamilton, but not until after the execution of the assignment to Warden. On the 20th of November, 1815, he deposited with a scrivener two of said notes, and also the mortgage deed, for the purpose of having an assignment thereof made to Warden to secure a debt due from Earle to him.

On the 27th of the same November, Earle endorsed one of the said six notes to said Hamilton, as part security for a debt due him

[1] *Southerin* v. *Mendum*, 5 N. H. 420 (1831); *Whittemore* v. *Gibbs*, 24 N. H. 484 (1852); *Ord* v. *M'Kee*, 5 Cal. 515 (1855), *accord*. See, also, *Jackson* v. *Bronson*, 19 Johns. 325 (1822).

from Earle, and at the same time assigned said mortgage deed and the premises therein mentioned to Hamilton, by his deed duly acknowledged and recorded on the same day: the said assignment being made on a separate piece of paper, and referring to the mortgage.

On the 28th of said November, the said Earle executed an assignment of said mortgage deed, on the back thereof, to said Warden, as security for his said debt to him and of some debts due from Earle to certain other persons, which Warden was to assume. This assignment was not acknowledged or recorded. The mortgage deed and the two notes, left with the scrivener for the purpose of having an assignment made, remained in the scrivener's hands until the actual execution of the said assignment to Warden. Hamilton recovered judgment for possession of the mortgaged premises against Adams, and possession was delivered to him by the proper officer: and Adams afterwards entered and continued in possession by a parol lease from the assignee of Hamilton.

The demandant offered to prove, by the testimony of Earle, that when he made the assignment to Hamilton, and prior to that time, Hamilton knew that the original mortgage deed was in the hands of the scrivener, for the purpose of an assignment being made to the demandant, for securing the payment of the two notes transferred to him as aforesaid.

But the Chief Justice, being of opinion that the demandant could not maintain his action, in consequence of the prior assignment to Hamilton, under which the tenant is in possession, and also that Earle was not a competent witness to prove the fact for which he was offered, if such fact were material, directed a nonsuit, which was to be set aside and a new trial granted, if upon the above facts, together with the said knowledge of Hamilton, this action could be maintained.

Burnside and *Bangs*, for the demandant.—The delivery of the mortgage deed, together with the notes endorsed, for the purpose specified, amounted to such an equitable assignment as the law will protect. It is said by Lord Mansfield in the case of *Martin* v. *Mowlin*, 2 Burr, 979, that "a mortgage is a charge upon the land: and whatever would give the money will carry the estate along with it, to every purpose. The estate in the land is the same thing as the money due upon it." "The assignment of the debt, or forgiving it, will draw the land after it, as a consequence; nay, it would do it though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the statute of

gagor, or in both combined. Such being the case, it is equally clear, appellee, to succeed, must have deduced title through one or both of these parties. This could only have been done by showing that the legal title had, by means of some of the legally recognized modes of conveying real property, passed from one or both of them to himself. This he did not do or attempt to do. Indeed, he does not claim through them, nor either of them. Not only so, neither Mrs. Kearns nor Greenebaum, through whom appellee does claim, derives title through any deed or conveyance executed by either the mortgagor or mortgagee. Nor does either of them claim as heir or devisee of the mortgagor or mortgagee.

As the assignment of the note and mortgage to appellee did not, as we hold, transfer or otherwise affect the legal title to the land, it may be asked, what effect, then, did it have? This question, like most others pertaining to the law of mortgages, admits of two answers, depending upon whether the rules and principles which prevail in courts of equity, or of law, are to be applied. If the latter, we would say none; because, as to the note, that could not be assigned by a separate instrument, as was done in this case, so as to pass the legal title. (*Ryan* v. *May*, 14 Ill. 49; *Fortier* v. *Darst*, 31 *id.* 213; *Chickering* v. *Raymond*, 15 *id.* 362.) As to the mortgage, it is well settled that could not be assigned, like negotiable paper, so as to pass the legal title in the instrument or clothe the assignee with the immunity of an innocent holder, except under certain circumstances, which do not apply here. (*Chicago, Danville and Vincennes Railway Co.* v. *Loewenthal*, 93 Ill. 433; *Hamilton County* v. *Lubukee*, 51 *id.* 415; *Olds* v. *Cummings*, 31 *id.* 188; *McIntyre* v. *Yates*, 104 *id.* 491; *Fortier* v. *Darst*, 31 *id.* 213.) But that the mortgagee, or any one succeeding to his title, might, by deed in the form of an assignment, pass to the assignee the legal as well as the equitable interest of the mortgagee, we have no doubt, though there is some conflict on this subject. (2 Washburn on Real Prop., p. 115, and authorities there cited.) Yet the assignors in the case in hand, not having the legal title, as we have just seen, could not, by any form of instrument, transmit it to another. If, however, the rules and principles which obtain in courts of equity are to be applied, we would say that by virtue of the assignment the appellee became the equitable owner of the note and mortgage, and that it gave him such an interest or equity respecting the land as entitled him to have it sold in satisfaction of the debt.

There is, perhaps, no species of ownership known to the law

which is more complex, or which has given rise to more diversity of opinion, and even conflict in decisions, than that which has sprung from the mortgage of real property. By the common law, if the mortgagor paid the money at the time specified in the mortgage, the estate of the mortgagee, by reason of the performance of the condition therein, at once determined and was forever gone, and the mortgagor, by mere operation of law, was remitted to his former estate. On the other hand, if the mortgagor failed to pay on the day named, the title of the mortgagee became absolute, and the mortgagor ceased to have any interest whatever in the mortgaged premises. By the execution of the mortgage, the entire legal estate passed to the mortgagee, and unless it was expressly provided that the mortgagor should retain possession till default in payment, the mortgagee might maintain ejectment as well before as after default. This is the view taken by the common law courts of England, and which has obtained, with certain limitations, in most of the States of the Union, including our own, in which the common law system prevails.

In *Carroll* v. *Ballance*, 26 Ill. 9, which was ejectment by the mortgagee against the assignee of the mortgagor to recover the mortgaged premises, this court thus states the English rule on the subject: "In England, and in many of the American States, it is understood that the ordinary mortgage deed conveys the fee in the land to the mortgagee, and under it he may oust the mortgagor immediately on the execution and delivery of the mortgage, without waiting for the period fixed for the performance of the condition,—citing Coote on Mortgages, 339; *Blaney* v. *Bearce*, 2 Greenlf. 132; *Brown* v. *Cramer*, 1 N. H. 169; *Hobart* v. *Sanborn*, 13 *id.* 226; *Northampton Paper Mills* v. *Ames*, 8 Metc. 1. And this right is fully recognized by courts of equity, although liable to be defeated at any moment in those courts by the payment of the debt." Again, in *Nelson* v. *Pinegar*, 30 Ill. 481, which was a bill by a mortgagee to restrain waste, it is said: "The complainant, as mortgagee of the land, was the owner in fee, as against the mortgagor and all claiming under him. He had the *jus in re* as well as *ad rem*, and being so, is entitled to all the rights and remedies which the law gives to such an owner." So, in *Oldham* v. *Pfleger*, 84 Ill. 102, which was ejectment by the heirs of the mortgagor against the grantee of the mortgagor, this court, in holding the action could not be maintained, said: "Under the rulings of this court, the mortgagee is held, as in England, in law, the owner of the fee, having the *jus in re* as well as the *jus ad rem*." In *Finlon* v.

ciple. Suppose the present plaintiff had obtained possession under his equitable title to the note and mortgage, and the heirs of Kearns, who hold the legal title, had brought ejectment against him, the action clearly could not have been maintained, for the reasons we have just stated. But it does not follow, because such an action would not lie against him, that he could, upon a mere equitable title, maintain the action against others. (*Cottrell* v. *Adams*, 2 Biss. 351; 9 Myers' Fed. Dec. 240.) The question in that case was almost identical with the question in this, and the court reached the same conclusion we have. See, also, *Speer* v. *Hadduck*, 31 Ill. 439.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.[1]

Judgment reversed.

[1] See, *Torrey* v. *Deavitt*, 53 Vt. 331 (1881); *Jordan* v. *Cheney*, 74 Me. 359 (1883).

CHAPTER IV (*continued*)

SECTION II.—EFFECT OF TRANSFER

MATTHEWS *v.* WALLWYN

HIGH COURT OF CHANCERY, 1798

(4 *Ves.* 118)

THE cause was heard upon bill and answer. When it was first opened, the Lord Chancellor directed it to stand over, that it might be formally argued; considering the point to be new, and of great importance, as it might affect the general credit of mortgages.

LORD CHANCELLOR [LOUGHBOROUGH]: In this cause the question was only whether the assignee of a mortgage had a right to be paid according to the sum that appeared due upon the mortgage deed, whatever might be the state of the account between the mortgagor and mortgagee. The circumstances had nothing in them so particular as to vary at all the general question. Matthews had created a mortgage, upon which Shepheard had advanced money; and, Shepheard being his attorney, the purpose of creating the mortgage was that money might be raised for the use of Matthews. Shepheard ought not to have made any use of the mortgage but for the purpose for which it was created, viz., to raise money for Matthews; but he thought fit to assign the mortgage without the privity of the mortgagor, and the assignee now claims to hold the mortgage to the full extent of the sum appearing due upon the face of the deed.

When the cause came on before me, a case was referred to in which, it was supposed, Lord Thurlow had entertained an idea, but not decided, that a mortgagor having permitted the mortgage deed without any indorsement upon it to be in the possession of the mortgagee, an assignee taking from that mortgagee might have a right to hold that mortgage to the full extent of it against the mortgagor who permitted the mortgagee to deal with and to make a security upon it. It was also supposed that in practice there is no occasion to make the mortgagor a party; and in some cases it may not be possible to make him a party to the assignment;

tiffs, who had no notice of the circumstances under which they were issued. No part of the principal or interest of the mortgage debt has ever been paid. Section 123 of the act above referred to authorizes the commissioners to apply the money to be raised by them in discharging such interest and principal.

The questions for the opinion of the Court were:—

1st. Whether the plaintiffs are entitled to recover in this action any and, if so, what sum as damages in respect of arrears of interest on the six mortgages or any of them.

2nd. Whether the plaintiffs are entitled to a writ of mandamus in the form endorsed on the writ.

COCKBURN, C. J. By 3 & 4 Wm. 4 c. cv. a local Act, which provided for the paving, cleansing, lighting, and improving the town of Herne Bay, certain commissioners are appointed: and by s. 119 the commissioners have power to mortgage the rates which they are empowered to levy under the Act for the purposes which they as such commissioners are to execute; and the present plaintiffs sue upon certain debentures which were issued by the commissioners under that section; and they also claim a writ of mandamus requiring the commissioners to apply the money raised or to be raised under the Act to the purposes of the Act. In order to construct certain buildings necessary for the purposes of the Act, the commissioners required a quantity of bricks, and Halket, to whom the debentures were originally given, supplied the bricks in question, and instead of being paid in cash he was paid by debentures. It is said that the transaction in respect of which the debentures were issued was illegal under s. 10 of the local Act, inasmuch as by that section any person acting as a commissioner is prohibited from entering into any contract with the commissioners; and that, therefore, the sale of the bricks by Halket to the commissioners, he himself being a commissioner, was an illegal transaction. It may be that the effect of this section was to render the transaction illegal as regards the contract between the commissioners and Halket. But as the commissioners have had the benefit of the contract, the question would be whether or not Halket could recover in indebitatus assumpsit for goods sold. I do not think it necessary to decide that question. I proceed entirely upon the ground that the defendants are estopped from disputing the validity of the debentures in question. It is true the commissioners have power under s. 119 only to borrow money, and it may be that under the power to borrow they were not authorized to

give debentures for the purpose of paying for goods and materials supplied to them for the purposes of the town. But the commissioners gave to Halket, in respect of the bricks which they got from him, debentures, in the form prescribed by the Act, which purport upon the face of them to be debentures given for money advanced to them. Halket, to whom the debentures were originally given, has parted with them for a valuable consideration to the testator of the present plaintiffs, who are in the position of assignees of the original holder, and we must take it as a fact that the assignees were perfectly ignorant of any illegality in the original transaction either as regards Halket being a commissioner, and therefore prohibited from entering into such a contract with the commissioners, or as to the fact of their being debentures given for goods supplied instead of for money advanced. Under those circumstances, it is clear the principle laid down in *Pickard* v. *Sears*, 6 A. & E. 469, and *Freeman* v. *Cooke*, 2 Ex. 654, is immediately applicable to the present case, as well also as the doctrine laid down in the judgment of this Court in the case to which my Brother Blackburn referred,[1] *Re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 584. In that case a railway company had been deceived into registering shares and granting certificates of registration, whereby innocent persons were induced to purchase those shares under the belief that the vendors were registered shareholders, and it was held that the company were estopped by their own act from denying the right of the innocent transferees of the shares to be registered as shareholders. I think the principle of all those cases is strictly applicable to this. How is a person who takes for a valuable consideration such debentures as these upon an assignment, regular in form, to know under what circumstances they were issued? The commissioners might be wrong in allowing these debentures to go forth, knowing that they might come into the hands of an innocent holder for value, but according to the principle of the cases cited, they are estopped from alleging that the debentures were illegally issued. The debentures on their face import a legal consideration, namely, the advance of money. The defendants issued the debentures with the knowledge that they were capable of being transferred, and would very likely be transferred to a holder for value; how can it lie in their mouths to say that the transaction in respect of which they gave these debentures was illegal? I think on the sound principle of the doctrine laid down in the cases which I have cited, such a defence cannot be made available.

[1] Upon the argument, the report of which is omitted here.

C., for both Lord Cairns in the last-mentioned case, and Lord Hatherley in *Hunter* v. *Walters*, lay it down broadly that a receipt for money estops the party giving it, as between him and a third person who has acted on the faith of it.

[FRY, L. J.:—An assignment of a chose in action is subject to all equities. Do you say that the receipt is an assertion that there are no such equities?]

I say that at all events it makes the equities unequal; a person who has given a receipt stating that he has received money, and then disputes its truth, cannot have as good an equity as a person who acted on the faith of the receipt.

[BOWEN, L. J.:—What do you say to *In re Natal Investment Company*, L. R. 3 Ch. 355?]

In that case there was no receipt, and no one buying a debenture in the market buys it on the faith of the whole of the money having been advanced, it being notorious that debentures are often issued below par. In none of the cases cited against us was there any indorsed receipt. *White* v. *Wakefield*, 7 Sim. 401, is strong in our favour.

The judgment of the Court (Sir James Hannen, and Bowen and Fry, L. JJ.), was delivered by

FRY, L. J.:[1] As the legal interest in the legacy was and is vested in the trustee of Mrs. Goulston's will, it is evident that the interests both of the plaintiffs and of the defendant Hunter are equitable interests only, and the real question for our decision is, what are the relative merits of these persons having adverse equitable interests? If the merits of the one are greater than those of the other, the Court will give the priority to the greater merits; if and only if the merits are equal, it will give the priority of right to the one who is prior in point of time.

The plaintiffs executed a deed which recited that they had received the whole sum of £250, and which stipulated that their right of redemption should be on payment of the sum of £250 and interest, they signed a receipt on the back of the deed stating that they had in fact received this sum of £250, and they permitted Bates, or Astley, who was acting with or for him, to have possession of the deed containing these false statements. That the plaintiffs were in a moral point of view excusable for these acts is beyond doubt, and that they were deceived by those whom they trusted, and as such are objects of sympathy, is equally clear.

[1] Portion of opinion omitted.

But they were inexact and careless, and placed in the hands of Bates or Astley the means of deceiving other persons, and these are in the view of a Court of Equity demerits.

Was Hunter guilty of negligence or want of care in his part of the transaction? He must, on the evidence before us, be taken to have advanced his money on the faith of the production of the mortgage deed and receipt signed by the plaintiffs; and if the assignment by the plaintiffs had been, not a mortgage but an absolute conveyance, it would, we think, have been clear that there would have been no negligence whatever on the part of the defendant Hunter in not inquiring of the plaintiffs as to their rights or claims. But it has been argued before us that there is a wide difference in this respect between a mortgage and an absolute conveyance, because it is said, and said truly, that in the ordinary course of business a prudent assignee of a mortgage, before paying his money, requires either the concurrence of the mortgagor in the assignment, or some information from him as to the state of accounts between mortgagor and mortgagee. The reason of this course of conduct is however, in our opinion, to be found in the fact that an assignee of a mortgage is affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage, and the assignee is bound to give credit for all moneys received by his assignor before he has given notice of the assignment to the mortgagor. But in the present case the assignment was made very soon after the execution of the mortgage, and before the time for payment had arrived; so that, whilst it was possible, it was not probable, that any payment would have been made either of principal or interest; and we are of opinion that if an assign is willing to take the risk of any payment having been made after the date of the mortgage he is not guilty of carelessness or negligence if, in the absence of any circumstances to arouse suspicion, he relies upon the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by the mortgage deed, upon the possession of that deed by the mortgagee, and upon the receipt for the full amount of the mortgage money under the hand of the mortgagor.

The presence of a receipt indorsed upon a deed for the full amount of the consideration money has always been considered a highly important circumstance. The importance attached to this circumstance seems at first sight a little remarkable when it is remembered that the deed almost always contains a receipt, and often a release, under the hand and seal of the parties entitled to

statutory right, created for the convenience of commerce alone, and must rely upon the statute for its support, and is not fostered and encouraged by courts of equity.

In *Westfall* v. *Jones*, 23 Barb. 10, the Court said: "Does the plaintiff, being a *bona fide* purchaser and assignee of the bond and mortgage, stand in any better condition than the person from whom he derived his title? It is a well-settled principle that the assignee of a chose in action takes it subject to all the equities which existed against it in the hands of the assignor." In this case the defense to the foreclosure was that the mortgage was given without consideration, and to defraud creditors, and the Court refused to enforce it, but left the assignee, as it would have left the mortgagee, where their contract left them. The case thus decides that the term *equities*, as here used, means *defenses*. The opinion of the Court proceeds: "But I am prepared to hold that the plaintiff has no other or greater rights in relation to this bond and mortgage, and stands in no better position, than Parsons, the mortgagee."

So, in Pennsylvania the same rule was held. In *Mott* v. *Clark*, 9 State R. 399, the Court said: "He (the assignee) takes it (the mortgage) subject to all the equities of the mortgagor, but not to the latent equities of a third person;" holding the same rule precisely as the case first referred to, as decided by Chancellor Kent; and such also was the case of *Prior* v. *Wood*, 31 Pa. State R., where the Court protected the assignee of the mortgagee against the latent equities of third persons against the assignor. And this is as far as any Court has gone in the protection of a *bona fide* assignee of a mortgage, when the proceeding was on the mortgage itself, and in the absence of any express statutory provision authorizing the assignment of the mortgage.

We find the law to be, both upon principle and authority, that the assignee of the mortgage in this case took it subject to the defense which the mortgagor had against it in the hands of the assignor. Of the sufficiency of that defense, to the extent admitted by the Circuit Court, no question was made.

The decree must be affirmed.

BAILY *v.* SMITH

Supreme Court of Ohio, 1863

(14 *Oh. St.* 396)

Ranney, J. On the 8th day of October, 1853, the plaintiff gave to the defendant, Charles H. Bolles, his negotiable promissory note for the sum of $5370, and payable two years after date, with interest. Prior to the 14th of December, in the same year, sundry payments had been made and indorsed thereon, leaving then due the sum of $2500; and on that day the plaintiff executed and delivered a mortgage upon real estate situated in Lorain county to secure this balance. On the 9th of June, 1856, he filed his amended petition against Bolles, the original payee of the note, Kendall and Lucas, through whose hands the note and mortgage had passed by assignment, and Smith, the then holder, to compel the delivery and cancellation of these instruments; alleging that the note was given for a pretended patent right for a machine which was utterly worthless, whether patented or not; that both the note and mortgage were obtained by fraud, and that every subsequent holder thereof took them with full notice of the fraud and want of consideration.

Smith alone answered the petition, and claimed to have purchased the note and mortgage from Lucas shortly before they fell due, without notice of any fraud or want of consideration, and to be a *bona fide* holder thereof for value, and entitled to be protected as such.

The plaintiff obtained the relief demanded in his petition for everything beyond the amount paid by Smith for the note and mortgage, with interest thereon, and for that amount an affirmative judgment for the sale of the mortgaged premises was rendered in favor of Smith, and the plaintiff was ordered to pay the costs of the action.

This judgment was founded upon a finding by the court that the note was obtained by fraud, and without consideration, of which the intermediate parties, Kendall and Lucas, had notice, and that, as against them and Bolles, the plaintiff was entitled to the relief prayed for in his petition; but the court further find that Smith purchased the note and mortgage from Lucas in September, 1855, and paid therefor $1250, without knowledge of the fraud and want of consideration existing between the original parties,

the importance of this mere term may be easily overrated. It certainly is not one of the incidental effects of the creation of the debt itself, and it can only be made to have relation to the debt by the force of the contract contained in the mortgage; and is incident to the debt only in the same sense that every independent contract, having for its object the payment or better security of the debt, is incidental to it. The existence of the debt is the occasion out of which they arise, and the subject of their various provisions; but they embrace all the elements of a perfect contract in themselves, and are enforced by appropriate remedies, according to their own stipulations. At law, a mortgage effects the conveyance of an estate upon condition; but in the view of a court of equity, where alone the rights of an assignee can be enforced, it is a chose in action, having no negotiable quality, and not differing in character from collateral personal agreements, designed to effect the same object. Any of these collateral agreements may be entered into for the purpose of securing a debt, evidenced by a negotiable instrument; and if they are not obtained by fraud, and rest upon a sufficient consideration, in the absence of any agreement to the contrary, they undoubtedly enure in equity to the benefit of any owner of the debt. But the question here is, whether one of these collateral agreements, made to secure a negotiable note, loses its character of a mere chose in action, and has imparted to it the qualities of negotiability, so that upon the transfer of the note it may be enforced, although obtained by fraud? This question has been repeatedly answered, in respect to a class of collateral agreements, much more intimately connected with the negotiable instrument than is the mortgage deed. We refer to guarantees indorsed upon the note itself. Passing by those which have been claimed to be such, but held by the courts to be mere indorsements, or original contracts, with apt words of negotiability incorporated in them, the universal doctrine has been that the legal title does not pass upon the transfer of the note; that they are mere non-negotiable choses in action, and to be treated in every respect as such. (*Lamorieux* v. *Hewit*, 5 Wend. 307; *McLaren* v. *Watson's Executors*, 26 Wend. 425; *Miller* v. *Gaston*, 2 Hill, 188.) In the first of these cases Chief Justice Savage says: "Promissory notes are negotiable only by virtue of the statute, but this negotiable quality is not extended to any other instrument relating to the note;" and Bronson, J., in the last, in support of the same position, says: "But the guarantee itself is not a negotiable instrument, and can not be transferred to a third person so as to give him a legal title

against it while in the hands of the original holder. To this view of the subject there are several answers.

The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien.

All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sequitur principale.*

In *Pierce* v. *Faunce*, 47 Maine, 513, the court say: "A mortgage is *pro tanto* a purchase, and a *bona fide* mortgagee is equally entitled to protection as a *bona fide* grantee. So the assignee of a mortgage is on the same footing with the *bona fide* mortgagee. In all cases the reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects."

Matthews v. *Wallwyn*, 4 Vesey, 126, is usually much relied upon by those who maintain the infirmity of the assignee's title. In that case the mortgage was given to secure the payment of a non-negotiable bond. The mortgagee assigned the bond and mortgage fraudulently and thereafter received large sums which should have been credited upon the debt. The assignee sought to enforce the mortgage for the full amount specified in the bond. The Lord Chancellor was at first troubled by the consideration that the mortgage deed purported to convey the legal title, and seemed inclined to think that might take the case out of the rule of liability which

the rule that the assignee of a mortgage takes subject to the equities between the original parties? According to the reasoning thus far, this is a case of an inherent equity as between a person having an interest in the equity of redemption and the mortgage. The mortgage, in form, covers the property claimed by the contractees; if they do not fulfill the contract, it certainly embraces it in full. What they say to the mortgagee is this: "Owing to certain equities between us and you, it is inequitable to enforce the mortgage against property which, as a matter of law, is actually covered by it, except you respect our rights."

Is, then, the plaintiff in any better position than Nott, the mortgagee? It is well settled that an assignee of a mortgage must take it subject to the equities attending the original transaction. If the mortgagee cannot himself enforce it, the assignee has no greater rights. The true test is to inquire what can the mortgagee do by way of enforcement of it against the property mortgaged; what he can do the assignee can do, and no more. In *Clute* v. *Robison*, 2 J. R. 612, the rule, as stated by Kent, Ch. J., is, that a mortgage is liable to the same equity in the hands of the assignee that existed against it in the hands of the obligee. (2 Vern. 692, 765; 1 Vesey, 122.) The rule is not simply that the assignee takes subject to the equities between the original parties, though that is sound law. (*Ingraham* v. *Disborough*, 47 N. Y. 421.) It goes further than this, and declares that the purchaser of a chose in action must always abide by the case of the person from whom he buys. (*Per* Lord Thurlow, in *Davies* v. *Austen*, 1 Vesey, Jr., 247.) The reason of the rule is, that the holder of a chose in action cannot alienate anything but the beneficial interest he possesses. It is a question of power or capacity to transfer to another, and that capacity is to be exactly measured by his own rights. (*Beebe* v. *Bank of New York*, 1 J. R. 552, *per* Spencer, J., and 549, *per* Tompkins, J.) Kent, Ch. J., in a dissenting opinion in the same case, would have confined the rule to the equities between the original parties to the contract. (*Id.* 573.) The opinions of Spencer and Tompkins, JJ., were, however, recognized as the correct exposition of the law in *Bush* v. *Lathrop*, 22 N. Y. 535. A considerable number of authorities are cited by the plaintiff as tending to show that the assignee of a chose in action is only subject to the equities between the contractor (assignor) and the debtor, and not to the so-called latent equities of third persons. Such cases as *James* v. *Morey*, 2 Cowen, 298, opinion of Sutherland, J.; *Bloomer* v. *Henderson*, 8 Mich. 402; *Mott* v. *Clarke*, 9 Barr, 404, and others of the same class, were

reviewed as to their principle or specifically in *Bush* v. *Lathrop*, 22 N. Y. 535, and repudiated. The doctrine of Lord Thurlow, in England, and of Spencer and Tompkins, JJ., already considered, was thus adopted rather than that of Kent, Ch. J. The law of some of the other states undoubtedly coincides with the views of Kent, but, since the decision in *Bush* v. *Lathrop*, must be regarded as without authority here.

The correct theory is well stated in 2 Story on Equity Jurisprudence, section 1040: "Every assignment of a chose in action is considered in equity as in its nature amounting to a declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt or to reduce the property into possession." This theory would lead to the conclusion that the action by the assignee must be precisely commensurate with that of the assignor, as it must be in his name and on the supposition that, for the purposes of the action, he is still owner. The case of *Dillaye* v. *Commercial Bank of Whitehall*, 51 N. Y. 345, is not opposed to this view, as the question in that case was not one of the enforcement of a mortgage, but concerned the title of the two claimants to the ownership of the mortgage itself. The point was, whether one who held a mortgage in trust, with an apparently unrestricted power of disposition, could transfer it free from the claims of the *cestui que trust* to a purchaser in good faith. It was held that he could. This case has no tendency to establish any right on the part of the assignee in enforcing the mortgage beyond that possessed by his assignor.

The plaintiff cites, to support his view, authorities to the effect that an assignee is a purchaser, and to the effect that "a mortgage is in form a conveyance of the land and an assignment of it is another conveyance of the same land." These cases, which are very numerous in the law books, refer only to the position of a mortgagee or assignee in a court of law, and were decided in England and in States of the Union where more technical views of the rights of a mortgagee in a court of law prevail than in this State. They are of no force in a court of equity, in which the case at bar is assumed to be pending, for in such a tribunal a mortgage is but a chose in action and security for a debt. Reference is also made to a class of cases appearing in the law reports of a number of the States, holding, in substance, that when a mortgage is given to secure a negotiable note, which is itself transferred before maturity for value, it is taken by the assignee free from all equities. It is argued that these authorities tend to show that the mortgage par-

paid purchase-money. This is not an interest in the land but only in the money, and to be obtained by an assignee of Nott in no manner, except by due notice of the mortgage and assignment given to the contractees. The plaintiff simply acquired Nott's rights, and stood in his place, according to *Schafer* v. *Reilly*, *supra*. (See also *Andrews* v. *Torrey*, 1 McCarter [N. J.] 355.) The cases of *Jackson* v. *Van Valkenburgh*, 8 Cow. 260; *Jackson* v. *Henry*, 10 J. R. 185; *Varick* v. *Briggs*, 6 Paige, 323; *Fort* v. *Burch*, 5 Den. 187, and others cited by the appellant, have no application to the case at bar. Those and others of the same nature are either cases of title obtained by fraud, or involve the effect of notice under the recording acts, or are instances of mortgages accompanying negotiable notes, and declared to partake of the character of the note. They are noticed and distinguished in *Schafer* v. *Reilly*, *supra*, and it is unnecessary to spend time upon them.

It should be added that, under the rules of equity jurisprudence, it is essential that one who claims to exclude an earlier equity must show that he is not only a purchaser, but has acquired the legal estate. What evidence was there, in the case at bar, that the plaintiff had acquired the legal estate? The complaint merely alleges an assignment of the debt and mortgage in writing. The referee only finds an assignment in writing. There is not a word anywhere concerning the acquisition of the mortgage by a deed or other instrument under seal. If the mortgagee had the "legal" estate, he did not transfer it by such an instrument as the law requires to transfer a freehold estate in land. The plaintiff was, undoubtedly, the equitable owner, by force of the assignment of the bond and the mortgage accompanying it, but that was not enough. The legal title must pass. (*Peabody* v. *Fenton*, 3 Barb. Ch. 451.) The authorities, to the effect that a deed or other mode of conveyance is necessary to pass the legal estate, strongly preponderate. (*Den* v. *Dimon*, 5 Halst. [N. J.] 156; *Warden* v. *Adams*, 15 Mass. 233; *Jackson* v. *Myers*, 11 Wend. 533, 539; *Morrison* v. *Mendenhall*, 18 Minn. 232; *Cottrell* v. *Adams*, 2 Bissell, 351; *Olds* v. *Cummings*, 31 Ill. 188; *Partridge* v. *Partridge*, 38 Penn. St. 78; *Graham* v. *Newman*, 21 Ala. 497; *Lyford* v. *Ross*, 33 Me. 197; *Smith* v. *Kelley*, 27 *id.* 237; *Givan* v. *Tout*, 7 Blackf. 210; 2 Washburn on Real Property [3d ed.] page 113, paragraphs 12 and 16, and cases cited.) Such cases as *Green* v. *Hart*, 1 J. R. 590; *Jackson* v. *Blodget*, 5 Cow. 202, and *Jackson* v. *Willard*, 4 J. R. 43, do not affect this question, as the matter of passing the legal title to the mortgage was not in controversy. *Johnson* v. *Hart*, 3 J. Cas. 322, only decides that

by the transfer of the debt an equitable title to the mortgage passes.

It is, however, not our intention to hold that the legal estate, under the present law of this State, ever does or can pass from the mortgagee to the assignee. On the other hand, it is now settled law that the mortgage is but a lien upon the land. The mortgagor, both in law and equity, is regarded as the owner of the fee, and the mortgage is a mere chose in action, a security of a personal nature. An assignment of a mortgage, in this view, cannot pass the title. (*Jackson* v. *Myers*, 11 Wend. 533, 539; *Kortright* v. *Cady*, 21 N. Y. 343; *Trimm* v. *Marsh*, 54 *id.* 599, 604; *Stoddard* v. *Hart*, 23 *id.* 559, 560; *Power* v. *Lester*, *id.* 527.) Rules owing their existence to a contrast between law and equity, and giving the later holder of a legal title a preference over an earlier holder of an equitable title, are not to be applied to a state of the law so entirely different from that which prevailed when the law of mortgages first originated. In other words, the power of a vendee of land to convey to a second purchaser, so as to shut out the equities between himself and the original vendor, is not to be referred to for the purpose of ascertaining the capacity of a mortgagee when he makes an assignment of the mortgage to shut out the equities between himself and the mortgagor, and those whom the mortgagor represents. If that rule were ever a part of the law of mortgages, the development of that branch of jurisprudence in this State demands that it should be discarded. . . .

The motion for reargument is denied.

All concur.[1]

MERCHANTS' BANK OF BUFFALO *v.* WEILL

Court of Appeals of New York, 1900

(163 *N. Y.* 486)

Appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 24, 1898, upon an order reversing a judgment in favor of defendant entered upon a decision of the court on trial at an Equity Term, and granting a new trial.

This was an action to foreclose a bond and mortgage and to

[1] And see *Elias Brewing Co.* v. *Boeger*, 74 Misc. (N. Y.) 547 (1911), *per* Crane, J.

collateral security for the payment of a note, which he contemplated getting discounted, and under an agreement with him that he should not have it recorded. Riley failed to procure the discount and plaintiff repeatedly requested the return of the bond and mortgage; Riley promised to return the same from time to time, but failed to do so, had the mortgage recorded, and assigned the bond and mortgage for a valuable consideration to the defendant, Bechstein. Plaintiff's husband was not made a party to this action. It did not appear that he had any interest in the real estate covered by the mortgage. A judgment was entered in favor of the plaintiff, declaring the bond and mortgage in suit void, and directing that defendant Bechstein surrender and deliver up the same. The General Term modified this judgment so as to declare the bond and mortgage void only as against plaintiff, and that the register of the city and county of New York be required to enter upon the record of the mortgage that it was adjudged void as against plaintiff, striking out the provision in the judgment directing the mortgage to be surrendered up and cancelled.

CHURCH, Ch. J. Neither the decision in *McNeil* v. *The Tenth National Bank*, 46 N. Y. 325, nor in *Moore* v. *Metropolitan Nat. Bank*, 55 N. Y. 41, affect the question involved in this case. Those cases hold that the owner of a chose in action is estopped from asserting his title against a *bona fide* purchaser for value, who purchased upon the faith of an apparent absolute ownership by assignment, conferred by the owner upon the assignee and seller, but neither of them intimated an intention to interfere with the well settled principle, that a purchaser of a chose in action takes it subject to the equities between the original parties, and that the assignor can give no better title than he himself has. On the contrary, Grover, J., in the last case declared, in answer to the suggestion that these principles might be impaired by the decision, that "no one pretends but that the purchaser will take the former (non-negotiable choses in action) subject to all defences valid as to the original parties, nor that the mere possession is any more evidence of title in the possessor than is that of a horse." It is only where the owner, by his own affirmative act, has conferred the apparent title and absolute ownership upon another, upon the faith of which the chose in action has been purchased for value, that he is precluded from asserting his real title, and this conclusion was arrived at by the application of the doctrine of estoppel.

At the time Riley transferred the bond and mortgage to the

defendant Bechstein, as between him and the plaintiff, the mortgagor, he had no title or interest which he could transfer. The mortgage was executed and delivered to him as an accommodation, to be used as collateral security for the payment of a note of $2,000, which he contemplated getting discounted at the New York National Exchange Bank, and under an agreement not to have it recorded. He failed to procure the discount, and the plaintiff repeatedly requested the return of the bond and mortgage, and Riley promised to return the same from time to time. It is very clear that the bond and mortgage in his hands were of no value, and that he could not have enforced them, and the defendant, when he purchased, occupied no better position. Riley could not sell any better title than he had, which was none, and the defendant could not acquire by the purchase from him any better title. The specific transaction in which the mortgage was to be used having failed, Riley's possession and right to the mortgage after that was no different than if it had been delivered to him without any agreement for its use at all. He was then the possessor of the bond and mortgage executed and delivered without consideration, and without authority to use it for any purpose. I have examined the evidence and am of the opinion that it is sufficient to sustain the findings of the Judge, and therefore the findings are conclusive. The husband was not made a party, and a mis-trial is claimed for this reason. He had no interest, as it appears, in the real estate, and the defect should have been taken by answer or demurrer. Otherwise it is deemed waived. (Code, § 148.)

The General Term modified the judgment, so as to preserve all the rights of the defendant against the husband, and he cannot in any event be injured.

The judgment must be affirmed.

All concur; RAPALLO, J., not voting.

Judgment affirmed.[1]

[1] *Westfall* v. *Jones*, 23 Barb. (N. Y.) 9 (1856), and *Hill* v. *Hoole*, 116 N. Y. 299 (1889), *accord*. But see *First Nat. Bank of Corry* v. *Stiles*, 22 Hun. (N. Y.) 339 (1880), in which it was held that a mortgage in the usual form, given to raise money for the mortgagor, but improperly negotiated and assigned by the mortgagee for his own purposes, "by the very form of the mortgage itself" created an estoppel against the mortgagor and those claiming under him. To the same effect, see *Commonwealth* v. *Councils of Pittsburgh*, 34 Pa. St. 496, 520 (1859); compare *Davis* v. *Burr*, 9 S. & R. (Pa.) 137 (1822); *McMasters* v. *Wilhelm*, 85 Pa. St. 218 (1877).

BROWN *v.* COLE

High Court of Chancery, 1845

(14 *Sim.* 427)

Bill to redeem a mortgage for a term of years made on the 1st of April, 1844.

The proviso for redemption stipulated that the mortgagee should re-assign the mortgaged premises on being repaid the money lent on the 1st of April, 1845, with interest in the meantime, by quarterly payments.

The mortgagor, having had an advantageous offer for the purchase of the premises shortly after the mortgage was made, tendered to the mortgagee the amount of the principal and of the interest up to the 1st of April, 1845, together with a re-assignment of the mortgaged premises; but the mortgagee would neither accept the money nor execute the deed; in consequence of which the bill was filed.

The defendant demurred to the bill for want of equity.

The Vice Chancellor [Shadwell] allowed the demurrer on the ground that it was contrary to the practice of the Court to decree the redemption of a mortgage before the day appointed for that purpose had arrived.[1]

GIBSON *v.* CREHORE

Supreme Judicial Court of Massachusetts, 1827

(5 *Pick.* 146)

This was a bill in equity, in which the plaintiff, as widow of Abraham Gibson, claimed the right to be let into her dower in two parcels of real estate in Boston, in the occupancy of the defendant.

The bill alleges that on the 10th of July, 1816, A. Gibson died, leaving the plaintiff his widow; that he was then seised of the premises, subject to a mortgage to P. C. Brooks, dated November 18, 1814, to secure the payment of 15,000 dollars in two years with semiannual interest; that his estate was represented as insolvent, and that Brooks proved the debt before the commissioners of in-

[1] *Abbe* v. *Goodwin*, 7 Conn. 377, 384 (1829), *accord.*

solvency; that the assets of the estate were sufficient to pay 90 cents on the dollar; that on the 26th of November, 1817, the premises were sold by the administrators, subject to the mortgage, and were purchased by the defendant; that the defendant, as a condition of the sale, gave his bond to the administrators to pay, take up, and discharge the mortgage as his proper debt, and that he entered under his deed from the administrators, which contained a stipulation that he should discharge the mortgage; that he afterwards, on the 8th of January, 1818, procured from Brooks an assignment of the mortgage and diverted the assets, holding the mortgage as a subsisting incumbrance, instead of discharging it according to his obligation. The plaintiff further alleges that, as to her, the assignment is inoperative and the mortgage discharged, or if not, that the assignment ought to stand for so much only as would remain due on the mortgage after deducting what the assets, if properly applied, would have paid. She further states that the defendant pretends that her rights, if she ever had any, were foreclosed by an entry under the mortgage on the 13th of February, 1818, and subsequent possession, but she avers that no such right of entry then existed in the defendant, he having before that time conveyed the estate by deed of mortgage to one Parker, and the assignment being inoperative, and that, if any such right did then exist, there has been no foreclosure, because at the time of the supposed entry the defendant was, and for a long time before had been, in the actual occupancy of the premises, having entered under his deed from the administrators; that the supposed entry was made in the absence of the plaintiff and entirely without her knowledge; that the defendant had never given her any notice of it, and that she was wholly ignorant, until shortly before the filing of her bill, that the mortgage was treated as having any force whatsoever, and that as soon as it came to her knowledge that it was set up by the defendant as a subsisting incumbrance, she offered to redeem and requested the defendant to state an account.

The defendant, in his answer, alleges that the plaintiff joined in the execution of the mortgage and thereby released her right of dower, and he denies that she is entitled to dower. He denies that the assets in the hands of the administrators should have been applied to the payment of the mortgage debt, or that he was bound to see to the application of the assets. He admits that he entered into a bond to pay, take up, and discharge the debt secured by the mortgage, so far as to save the intestate's estate harmless from the same, but denies that he engaged to release or extinguish the

in equity made after such release or discharge but without actual notice thereof, falls to the ground. The act of payment in the country *ante vel apud diem* saves the forfeiture of an estate held by a conveyance defeasible on a condition subsequent. No record of such an act is necessary to make the estate a fee simple estate in the grantor or mortgagor, as against all persons claiming by a subsequently acquired title. The release of the Loan Fund Association to the mortgagor was a useless and superfluous act, which added nothing to the strength of the title which he had acquired by a performance of the condition of the mortgage before a breach.

It follows that the title of the demandants under the sale of the right in equity to redeem the estate is invalid. The premises being unincumbered and held by the judgment debtor as an estate in fee at the time of the service of the execution, could be legally levied on only by an appraisement, and set off in the mode prescribed by law. (*Forster* v. *Mellen*, 10 Mass. 421; *Freeman* v. *M'Gaw*, 15 Pick. 82; *Perry* v. *Hayward*, 12 Cush. 344.)

Exceptions sustained.[1]

(*b*) *After Default*

EMANUEL COLLEGE *v.* EWENS, 1 Ch. Rep. 18 (Chancery, 1625).[2] That the Earl of Huntington, seized in fee of the Manor of North-Cabury, with advowson appendant, and for payment of debts by way of mortgage, 25 Eliz., made a lease for 500 years of the said manor, with appurtenances, not mentioning the advowson by express name, with a clause of redemption, and for advancement of learning and religion, of his free disposition in 28 Eliz. by deed granted the said advowson to Sir Francis Hastings, and others, and their heirs, to the use of the said Earl for life, remainder to the Master, Fellows, &c., of the said college, and their successors forever; and shortly after in the same year paid his said debts. And this court conceived the said lease, being but a security, and that money paid, the said lease being void, as well against the said college as against any other; and though the money was not paid at the day, but afterwards, the said lease ought to be void in equity as well as on a legal payment, it had been void in law against them.

[1] *Compare*, *Watson* v. *Wyman*, 161 Mass. 96, *per* HOLMES, J.

[2] A portion only of the case as reported is here given.

MANNING *v.* BURGES, 1 Ch. Cas. 29 (The Rolls, 1663). A mortgage was forfeited; the mortgagor afterwards meeting the mortgagee, said, "I have moneys; now I will come and redeem the mortgage." The mortgagee said to him he would hold the mortgaged premises as long as he could; and then when he could hold them no longer, let the devil take them if he would. And afterwards the mortgagor went to the mortgagee's house with money more than sufficient to redeem the mortgage, and tendered it there; but it did not appear that the mortgagee was within, or that the tender was made to him; and it was decreed a redemption, and the defendant to have no interest from the time of the tender, because of his wilfulness.

LUTTON *v.* RODD, 2 Ch. Cas. 206 (Chancery, 1675). A deed in the nature of a mortgage and covenant to reconvey on payment: the money was tendered at the day and place, and refused: Decreed, the money without interest from the time of the tender, and to reconvey, though that the plaintiff ought to make oath that the money was kept and no profit made of it.[1]

WILTSHIRE *v.* SMITH

HIGH COURT OF CHANCERY, 1744

(3 *Atk.* 89)

A BILL was brought to redeem a mortgage on the 8th of May, 1742, in which the plaintiff insists upon a redemption on paying the principal money only, for that the interest ought to end the 20th of February, 1741, because the plaintiff had given six months' notice to pay off the mortgage, and on that day tendered the principal and interest and a deed of assignment, but the defendant absolutely refused to take the money.

The defendant swears that he offered to take the money, provided he might have time to consider of it and to advise upon the deed of assignment, as there are covenants in it on his part, upon which, as he is not of the profession of the law himself, it is reasonable he should ask the opinion of some attorney, whether they were such as he might safely execute.

[1] *Gyles* v. *Hall*, 2 P. Wms. 378 (1726); *Stow* v. *Russell*, 36 Ill. 18 (1864), and the authorities generally, *accord*.

he offer to bring it into court; and it did not appear, from the finding of facts or otherwise, that he in any way kept the tender good.

The plaintiff had the usual judgment of foreclosure, and for a sale of the mortgaged premises. Upon appeal by the defendant Cady, this judgment was affirmed at General Term in the First District; whereupon he appealed to this Court.

COMSTOCK, Ch. J.[1] After the suit was commenced to foreclose the mortgage, Cady, who had become the owner of the land, tendered the amount due, with the costs, which being refused, he set up the tender in his answer, in bar of the further maintenance of the action. The only question in the case is, whether a tender, made after a mortgage is due, by the owner of the lands mortgaged, discharges the lien.

Forty years ago this question was fully determined by the Supreme Court of this State, in the case of *Jackson* v. *Crafts*, 18 John. 110. Mr. Justice Woodworth, in delivering the opinion of the court, observed: "From the nature of the interest the mortgagee has, there is no necessity of a reconveyance by him to the mortgagor after the mortgage has been paid. When that is done, the mortgagee has no title remaining in him to convey, and consequently, by our laws, on payment of the money he is not deemed a trustee, holding the legal estate for the benefit of the mortgagor. The only question, then, is, whether tender and refusal are equivalent to payment." Having thus truly stated the relation between mortgagor and mortgagee, according to the law as it was then and has been ever since well settled in this State, he cited some of the early English authorities, holding that a tender of the money due discharged the land from the lien.

[After discussing the decision in *Merritt* v. *Lambert*, 7 Paige, 344, and stating that the Chancellor in that case was of the opinion that a mere tender unaccepted after the law day did not discharge the lien of the mortgage, the learned Chief Judge proceeded:]

In giving his views upon the last mentioned question, the Chancellor criticised the opinion of Judge Woodworth in *Jackson* v. *Crafts* (*supra*), for the reason that the English authorities which he referred to related to a tender on the day when the mortgage debt became due. (Bac. Abr., tit. Tender, F.; Co. Lit., 209 b, § 338; 20 Viner, tit. Tender, N., § 4.) On this criticism I shall make one or two observations. By the ancient common law, a

[1] The order of the opinions has been changed, and portions have been omitted.

mortgage was a grant of land defeasible on the condition subsequent of paying the money at the exact time specified. (1 Powell on Mortgages, 4.) On failure to perform that condition the grant was absolute, and neither tender nor payment made afterwards could have the effect to revest the title. The specified time of payment was called the law day, because after default the legal rights of the mortgagor were gone. The estate became vested in the mortgagee absolutely, because the original grant was freed from the condition. "For these reasons," the Chancellor himself remarked, "it is, that the mortgagor, or his assigns, or subsequent incumbrancers upon the mortgaged premises, are driven to a bill to redeem, where the mortgagee refuses to receive what is equitably due to him. But this could not be necessary," he added, "if a mere tender of the amount due after the mortgage has become forfeited would have the legal effect of discharging the mortgaged premises from the lien of the mortgage." It is a self-evident proposition, which the Chancellor need not have undertaken to prove, that when the law was that even payment after the law day would not discharge the mortgage, a mere tender could not have such an effect. He was probably quite correct in saying that the English authorities cited by Judge Woodworth referred to tender at the day, because those authorities were of a date when even payment after the day did not divest the estate or interest of the mortgagee. But Judge Woodworth and the eminent men who sat with him on the bench of the Supreme Court considered, what the learned Chancellor seems to have failed to notice, the fundamental change which the law of mortgage had undergone long before the decision in *Jackson* v. *Crafts* was pronounced. In this State, a mortgage had always been regarded as a mere security or pledge for the debt; and the rule had always been that payment at any time discharged the lien, so that no reconveyance of the estate was necessary. It seems to me, therefore, that the authorities cited by the Supreme Court, on the effect of tender, were extremely pertinent to the question, because they showed very conclusively that a tender at the law day had the same effect on the mortgage as a payment on that day. Underlying this particular proposition, of course, was the more general doctrine that when a certain effect must be given to a payment, a tender will have a like effect. This was what the Supreme Court undoubtedly meant, and the authorities cited simply showed the application of the principle to the law of mortgage. The principle itself, or its application, was not questioned by the Chancellor; but he did not consider, so

a mere security or pledge of the land covered by it for the money borrowed or owing, and referred to in it, and that the mortgagor remains the owner of the estate mortgaged, and may maintain trespass as against even the mortgagee. (*Runyan* v. *Mersereau*, 11 John. 534.) The debt, in the eye of the law, thus becomes the principal, and the landed security merely appurtenant and secondary; and the rights of the parties must be governed by those principles of law applicable to analogous cases. Acceptance of payment of the amount due on a mortgage, at any time before foreclosure, has always been held to discharge the incumbrance on the land; as acceptance of the amount for which personal property was held discharged it from the pledge. Tender and refusal are equivalent to performance. (*Kemble* v. *Wallis*, 10 Wend. 374.) This is to be taken with the reservation already stated, that the debt or duty remained, and that the rejected tender, at or after the stipulated time of payment or performance, has the effect only to discharge the party thus making it from all the contingent, consequential or accessory responsibilities and incidents of his contract, but without releasing his prior debt. (*Coit* v. *Houston*, 3 John. Ca. 243.) In *Hunter* v. *Le Conte*, 6 Cow. 728, the Supreme Court held that a tender of rent takes away the right to distrain till a subsequent demand and refusal; but it does not take away the right to sue for the rent as for a debt. It only saves the interest and costs. And that a tender of rent makes a distress wrongful, though the tender be not made till after the rent day. It will readily be perceived that the principle of this case bears directly upon the question now under consideration; and it is not perceived, if it be sound, why a tender and refusal of the amount due on a mortgage does not extinguish its lien equally with a tender of rent and refusal, which, as we have seen, extinguishes the right of distress. But a still closer analogy to the present question is presented by the law of tender, as to the lien on goods pledged. Lord Ch. J. Holt, in his opinion in the celebrated case of *Coggs* v. *Bernard*, 2 Lord Ray. 909, speaking of the fourth class of bailments, says: "If the money for which the goods are pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined." So also Comyn: "By tender of the money, the property in the goods is determined, and the pledge ought to be returned. But if the pawnee refuse to restore the pledge upon tender, trover lies against him." (Comyn's Dig., tit.

Mortg., A, and cases there cited.) Holding, as we do, therefore, in this State that the land mortgaged is but a security for the debt due to the mortgagee, in other words, a pledge to him to secure its payment, it is difficult to see why the principles enunciated and well settled in reference to the pledge of personal property do not apply, and why a tender and refusal at any time of the full amount of the debt due does not extinguish the lien of the mortgagee, or pledgee, in the one case as it clearly does in the other.

But I think we are not left at liberty to settle this case on principle, but are to regard it as authoritatively disposed of by the courts of this State. A very careful examination of the decisions has brought my mind to the conviction, contrary to my first impression, that we should regard the question now presented as not open to further discussion. I shall recur to the cases in which this question has arisen; and I think an examination of them will lead to the same conclusions to which I have arrived.[1] . . .

It is not perceived how the mortgagee is to be embarrassed, or his security impaired, by the adoption of this rule, as seems to be supposed by the Chancellor in *Edwards* v. *Farmers' Loan Company*, 26 Wend. 552. If the mortgagor does not tender the full amount due, the lien of the mortgage is not extinguished. The mortgagee runs no risk in accepting the tender. If it is the full amount due, his mortgage lien is extinguished and his debt is paid. This is all he has a right to demand or expect, and all he can in any contingency obtain. His acceptance of the money tendered, if inadequate and less than the amount actually due, only extinguishes the lien *pro tanto*, and the mortgage remains intact for the residue. A much greater hardship might be imposed, and serious injury be produced, by holding that the mortgagor cannot extinguish the lien of the mortgage by a tender of the full amount due. It has never occurred to any judge to argue that a pawnee was in great peril, and in danger of losing the benefit of his pawn, by the enforcement of the well settled rule that a tender of the amount of the loan and interest, and refusal, extinguished the lien on the pawn. Littleton well says, that it shall be accounted a man's own folly that he refused the money when a lawful tender of it was made to him. The only effect upon the rights of the mortgagee is, that the land or thing pledged is released from the lien, but the debt remaineth.

The only remaining question to be considered is, whether the tender in this case was well made, it not being followed with the

[1] The examination of the authorities is omitted.

think that he can have no benefit by reason of it; and that the judgment should be affirmed, with costs.

Judgment reversed.[1]

SHIELDS *v.* LOZEAR

COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1869

(34 *N. J. L.* 496)

IN ejectment. Error to the Supreme Court.

DEPUE, J. The bills of exception sealed at the trial raise two questions:

Second, whether a tender by the mortgagor of the money secured by a mortgage, which is not accepted by the mortgagee, made after the day of payment named in the condition, terminates the estate of the mortgagee in the mortgaged premises, and extinguishes the lien of the mortgage on the land.[2] . . .

The extinguishment of the lien of the mortgage by the unaccepted tender of the mortgage money after the day named in the

[1] *Caruthers* v. *Humphrey*, 12 Mich. 270 (1864); *Potts* v. *Plaisted*, 30 Mich, 149 (1874); *Story* v. *Krewson*, 55 Ind. 397 (1876); *Thomas* v. *Seattle Brewing Co.*, 48 Wash. 560, 94 Pac. 116 (1908) *accord.* So where mortgagee evades tender: *Ferguson* v. *Popp*, 42 Mich. 115 (1879); *McClellan* v. *Coffin*, 93 Ind. 456 (1883). And see *Breitenbach* v. *Turner*, 18 Wis. 140 (1864), and *Mankel* v. *Belscamper* 84 Wis. 218 (1893), *semble, accord.* But the authorities generally are *contra: Currier* v. *Gale*, 9 Allen (Mass.) 522 (1865); *Perre* v. *Castro*, 14 Cal. 519 (1860); *Crain* v. *McGoon*, 86 Ill. 431 (1877); *Matthews* v. *Lindsay*, 20 Fla. 962 (1884); *Knollenburg* v. *Nixon*, 171 Mo. 445, 72 S. W. 41 (1903).

In *Perre* v. *Castro, supra*, the Court said, "The debtor is as much in default for not paying when the debt is due as the creditor is in default for not receiving the money afterwards when offered. It would be very harsh to hold that the debt is lost—the general effect of losing the security—by a mere refusal at a particular moment to receive it."

In the recent Washington case of *Easton* v. *Littooy*, 158 Pac. 531 (1916), *held*, that "in order to discharge the lien, the proof must be clear that the refusal was palpably unreasonable, absolute, arbitrary and unaccompanied by any bona fide, though mistaken, claim of right." *Cf. Williams* v. *Ashe* (1896), 111 Cal. 180, 43 Pac. 595.

In *Maxwell* v. *Moore*, 95 Ala. 166, 10 So. 444 (1892), a lien jurisdiction *held* that a tender of payment of the mortgaged debt after maturity will not operate to discharge the mortgage lien unless the money tendered is placed in the custody of the Court.

[2] The opinion on the first point is omitted.

condition, was contended for by the plaintiff's counsel with much earnestness.

A mortgage, at common law, is a conveyance absolute in its form, granting an estate defeasible by the performance of a condition subsequent. The estate thus created was strictly an estate on condition, and in a court of law was treated as subject to be defeated only by the performance of the condition in the manner and at the time stipulated for in the defeasance. If made on condition that the conveyance should be void on payment of a definite sum of money on a given day, and the condition was performed according to its terms, the estate reverted back to the mortgagor without any re-conveyance, by the simple operation of the condition. A tender at the time and place and in the manner prescribed in the instrument itself was equivalent to performance, and operated to determine the estate of the mortgagee, and revest it in the mortgagor. (Lit. § 335; Co. Lit. 207, a.; 4 Kent, 193; Coote on Mortgages, 6; *Merritt* v. *Lambert*, 7 Paige, 344.) But when the condition was discharged by failure to comply with its terms, the estate of the mortgagee became absolute in law, and the title of the mortgagor was completely divested and gone, and a reconveyance was necessary to restore him to his original estate. (Lit. § 332; 2 Black. Com. 158; Coote on Mortgages, 9.) So inflexibly was this harsh rule of the law adhered to, that it was remarked by a learned writer that if the debtor had no greater mercy shown to him than a court of law will allow, the smallest want of punctuality in his payment would cause him forever to lose the estate he had pledged. (Williams on Real Prop. 333.) The rigor of this rule was somewhat abated by the statute of 7 George II., ch. 20 (1 Evans' Statutes, 243, re-enacted in this State December 3d, 1794, Nix. Dig., 4th ed., 608), which permitted a mortgagor, when an action was brought on the bond or ejectment on the mortgage, pending the suit, to pay to the mortgagee the mortgage money, interest, and all costs expended in any suit at law or in equity; or in case of a refusal to accept the same, to bring such money into court where such action was pending, which moneys so paid or brought into court were declared to be a satisfaction and discharge of such mortgage; and the court was required, by rule of court, to compel the mortgagee to assign, surrender, or re-convey the mortgaged premises unto the mortgagor, or to such other person as he should for that purpose nominate and appoint. In cases strictly within the terms of this statute, the English courts of law have exercised an equitable jurisdiction

to apply only in certain cases mentioned in its preamble and in the introductory words of the statute, and was not intended to supplant bills for redemption. The subject is one that falls peculiarly within the jurisdiction of courts of equity. The remedy there is complete by bill for a redemption, and relief may be speedily obtained by the exercise of the undoubted power of the court, by the writ of assistance to carry into effect its decree, by putting the mortgagor in possession, where the mortgagee has obtained possession under the mortgage. (*Yates* v. *Humbly*, 2 Atk. 363; *Green* v. *Green*, 2 Simons, 399, 406; Bacon's Ordinances in Chancery, 9; *Valentine* v. *Teller*, Hopk. C. R. 422; *Devancene* v. *Devancene*, 1 Edw. C. R. 272; *Kershaw* v. *Thompson*, 4 Johns. C. R. 609; *Schenck* v. *Conover*, 2 Beas. 221; *Fackler* v. *Worth*, *Ib.*, 395; *Thomas* v. *De Baum*, 1 McCarter, 37; 2 Dan. Chan. Prac. 1280.)

It is not, therefore, essential to the administration of justice that courts of law should, in the absence of the imperative requirements of a statute, entertain a jurisdiction that pertains to courts of equity, in the exercise of which equities may arise that a court of law may be incompetent to deal with.

There is no error in the rulings of the court below, and the judgment should be affirmed.

TUTHILL *v.* MORRIS

Court of Appeals of New York, 1880

(81 *N. Y.* 94)

Appeal from judgment of the General Term of the Supreme Court, in the Second Judicial Department, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

This action was brought to restrain the defendant from selling certain premises in statutory proceedings to foreclose two mortgages thereon and to have the same adjudged to be extinguished and to require defendant to cancel the same of record, on the ground that the amount of the mortgages was duly tendered and refused.

The mortgages were executed by plaintiff. The mortgagees commenced proceedings to foreclose the same by advertisement under the statute. Pending the proceedings they assigned the mortgages to defendant. Defendant requested one Steers, an

attorney, to attend the sale for him. The circumstances and the nature of the employment, together with the occurrences out of which the alleged cause of action accrued, are set forth in the opinion.

RAPALLO, J. The uncontroverted evidence shows that Mr. Steers, to whom the tender relied upon by the plaintiff was made, was not the attorney in the foreclosure proceedings nor connected with such attorney, nor the agent of Mr. Morris, except for the specific purpose for which he was employed; that his first and only connection with Mr. Morris of the foreclosure was that he was requested, on behalf of Mr. Morris, to go to the place of sale and engage an auctioneer, and to attend the sale and see that it was properly conducted. It may also be inferred from the testimony that he was instructed that the sale should be for cash. It is conceded by the respondent's points that Mr. Steers had no express authority to receive a tender and that none was thought of. Mr. Steers did not know nor was he informed of the amount due for principal, interest, or costs, beyond such information as was afforded by the notice of sale, nor does it appear that he had any means of ascertaining the amount of the costs. He was not empowered to receive the purchase money, for this would be payable only on the execution of the deed by the mortgagee. When he arrived at the place appointed for the sale he was presented with a summons, complaint and order of injunction in an action by the plaintiff against Mr. Morris, but declined to receive or admit service thereof on behalf of Mr. Morris, on the ground that he was not his attorney. The injunction order was then read to him. It ordered that the sale be upon the terms, among others, that not more than 10 per cent. of the amount bid be paid down. He stated, as testified to by the plaintiff's attorney, that he was instructed to sell for cash, and said that if he could not do that he should adjourn the sale, and accordingly instructed the auctioneer to adjourn the sale for thirty days. After he had announced his intention to adjourn the sale, but before he had instructed the auctioneer, and as he was about doing so, the alleged tender was made by Mr. Tuthill, one of the plaintiff's attorneys, in the following manner, as testified to by Mr. Tuthill: Mr. Tuthill testifies that he tendered to Mr. Steers a quantity of greenbacks, amounting, in fact, to $6,300, and said to Mr. Steers that he tendered the money in behalf of the plaintiff for the whole amount due. That he did not state how much money there was, but tendered it, and

derpoel, dated April 19, 1842, which had been duly filed in the proper town clerk's office. The instrument recited that Vanderpoel was indebted to the plaintiffs in the sum of $498.72, being the amount of three promissory notes made by Vanderpoel, and held by the plaintiffs, and the mortgage was to become void if Vanderpoel should pay the debt by the first day of October then next. Evidence was given tending to show a just consideration for the notes. At the time the mortgage was given the property was on the farm of the mortgagor, and was used by one Mosher, who worked the farm on shares, under an agreement by which Vanderpoel was to furnish teams, stock and utensils. After the mortgage was given the property remained on the farm, and was used as before. On the 15th day of July, 1842, the defendant, as sheriff of the county of Columbia, sold the property in question by virtue of an execution against Vanderpoel, in favor of the Lafayette Bank, which was delivered to the sheriff on the 5th of May, 1842. The evidence tended to show that the plaintiffs asserted their claim under the mortgage at the sale, and forbid the sale.

It also appeared that on the 7th of May, 1842, the plaintiffs took from Vanderpoel a bond and warrant of attorney for the amount of the notes secured by the mortgage, upon which judgment was entered in the Supreme Court on the same day, and execution thereon was, by Vanderpoel's consent, issued immediately to one of the deputies of the sheriff aforesaid. It was also proved, after objection duly made and exception by the defendant's counsel, that it was agreed between the plaintiffs and Vanderpoel that the judgment should be taken as collateral to the mortgage. The plaintiffs' execution, soon after it was issued, was levied upon the property in question, and the property was advertised for sale both under that execution and the one above mentioned in favor of the Lafayette Bank.

It also appeared that after the sheriff's sale above mentioned the plaintiffs made a motion in the Supreme Court for an order requiring the defendant, as such sheriff, to apply the proceeds of the sale on the judgment and execution in their favor. This motion was based upon an allegation that the execution of the Lafayette Bank, when first delivered to the sheriff, was directed to the sheriff of the county of Hudson (there being in fact no such county), and that the error was corrected and the execution redelivered to the sheriff after the execution of the plaintiffs was issued. The motion was denied with costs.

The defendant's counsel requested the Circuit Judge to decide and charge the jury: 1. That the mortgage under which the plaintiffs claimed was fraudulent and void as against the judgment and execution of the Lafayette Bank. 2. That the judgment taken by the plaintiffs on the 7th of May, 1842, for the same notes secured by the mortgage, merged the notes and extinguished the lien of the mortgage. 3. That the issuing of execution upon that judgment, the levy upon the mortgaged property, and the motion to the Supreme Court to have the proceeds of the sheriff's sale applied upon that execution, were severally acts inconsistent with any claim under the mortgage, and destroyed all right to assert any such claim.

The Circuit Judge ruled that the question of fraud was one of fact for the jury to decide. That the judgment was not a merger or extinguishment of the mortgage, if it was taken as collateral merely; if not so taken, then that it was a merger. Upon the 3d proposition he refused to charge as requested. The defendant excepted, and the jury gave their verdict for the plaintiffs. The defendant moved in the Supreme Court for a new trial on bill of exceptions, which was granted by that court. The plaintiffs appealed to this court under the judiciary act of December, 1847.

JOHNSON, J. The question of the *bonâ fides* of the mortgage was properly submitted to the jury, and their verdict in favor of the honesty and fairness of the transaction is conclusive according to all the cases since *Smith* v. *Acker*, 23 Wend. 653.

The Circuit Judge was requested to charge the jury that the subsequent judgment on the notes operated as a merger of the notes and consequently avoided the mortgage. The Judge, however, charged that the judgment did operate as a merger of the notes and mortgage unless it was satisfactorily shown that the judgment was taken as collateral to the mortgage, in which case it was not a merger.

The charge upon this point was in strict accordance with the rule laid down by the Supreme Court (1 Denio, 407) when this cause was before it on a former trial, and must be regarded as correct unless that court was then in error as to the true rule upon the subject.[1]

[1] "If then the judgment was intended as a collateral security to the notes and mortgage before executed, it would be clear that the notes and mortgage were not merged in or extinguished by the judgment, but remained a valid conveyance under which the plaintiffs could make title

(unsealed) note to secure the same debt. The mortgage contains no covenant to pay, but the condition is that the instrument shall be void if the above sum, with interest, is paid on the 1st of February, 1836, "in the manner particularly specified in the condition of his (the mortgagor's) certain bond or obligation bearing even date herewith." The mortgage was duly acknowledged and recorded. The answers interposed several defenses; and among others, the defense of payment; and that the plaintiff's cause of action was barred by the statute of limitations, in consequence of its not accruing within six years before suit brought. The justice before whom the cause was tried, without a jury, came to the conclusion, upon the evidence, that there was an unpaid balance due on the note, and that he should have given judgment for the plaintiff but for the fact that more than six years had elapsed since the said note became due, and the cause of action thereon accrued prior to the commencement of this suit; and for that reason he gave judgment for the defendants. The case therefore presents the question whether a debt secured by a sealed mortgage and an unsealed note can be enforced by a foreclosure of the mortgage, after the expiration of six but before the expiration of twenty years from the time when the debt became due. As has been said, there is no covenant in the mortgage to pay the debt; but at the same time the debt, its amount and the time of payment, are specified in the mortgage; and it is provided that in case "default shall be made in the payment of all or any part of the said principal sum of two hundred and fifty dollars, or the interest thereof, at the time or times when the same ought to be paid as aforesaid, that then, and in such case," the mortgagee may sell and dispose of the premises, &c. The true question, therefore, would seem to be, has the mortgage been paid? or, rather, in this case, is the lapse of six years since the maturity of the note, without any subsequent recognition or acknowledgment of the debt, conclusive evidence of payment? The justice trying the cause has come to the conclusion, upon the evidence, that a part of the debt is actually unpaid. Is there a legal bar to giving effect to that conclusion by rendering judgment for the plaintiff, in consequence of the lapse of time before mentioned? If this is substantially an action upon the note, then it is barred, for it is an action upon simple contract and must be brought within six years. (Code, § 90.) And the plaintiff in such case fails, not because the debt is in fact shown to be paid, but because the law forbids the action. The remedy is taken away. But this is not in terms or effect an action upon the note. The

mortgage would be good without the note. If there had been no note, but only the evidence of the debt recognized in the mortgage, is there any doubt that the mortgage could have been enforced after the debt became due, and for twenty years afterwards? The only question would be, was there a debt remaining unpaid—a security upon real estate—and was the lien enforced during the period that the law gives it legal existence? The additional recognition of the debt, in the shape of a promissory note, ought not to detract from its force. It is said that the note is the principal, and the mortgage only the incident; that is, that it is given only as a security for the note. In a certain sense, this is true. But in fact the debt itself is the principal thing, and the note is one form of security for, or evidence of, the debt, and the mortgage another. Suppose the mortgage contained a covenant to pay the debt, would it be any the less the principal thing than the note? True, the note (if negotiable) would have some facilities for an easy transfer, and might be negotiated independent of the mortgage. If so transferred, it would in law carry the mortgage with it, and so would the mortgage carry the note with it. The payment of either would be the payment of the other, except so far as a *bonâ fide* holder of the note for value is concerned, who might, under the law applicable to commercial paper, be protected. It is said that the note, from the lapse of time, is presumed to be paid. Not altogether so; for the law allows a suit upon it and a recovery, unless the statute of limitations is pleaded. It is therefore, at most, but a presumption; suffered to be overthrown, it is true, only in one way, and that is, by proof of payment thereon, or recognition thereof, in the way pointed out in the statute. This, however, as before stated, only acts upon the remedy. It is an arbitrary and an artificial rule, not to be carried, I think, beyond the well-defined limits of the statute itself. The case of *Jackson* v. *Sackett*, 7 Wend. 94, is much relied on as decisive authority in support of the bar. That was ejectment upon a forfeited mortgage, secured also by a note. The tenor of Mr. Justice Sutherland's able opinion is towards regarding the lapse of six years, unexplained, as sufficient evidence of payment. But he held that the bar was not absolute, and that circumstances tending to show that the note was unpaid were proper for the consideration of the jury, and a new trial was in fact granted for withdrawing the case from the jury. We are not precisely apprised by the case at bar what circumstances here exist; but we are told in the case itself that the plaintiff gave evidence "tending to show that there was due upon the mortgage about the sum of $70;

that, in cases where there was a concurrent jurisdiction at law and in equity, time was as absolute a defence to the action in equity as to one at law; not on the ground of expediency, or as a matter of discretion founded on analogy to the statute of limitations, as was the case in some actions of purely equitable cognizance, but in obedience to the statute. (*Rosevelt* v. *Mark*, 6 John. Ch. R. 266; *Kane* v. *Bloodgood*, 7 *id.* 90; *Murray* v. *Coster*, 20 John. 576; *Sawyer* v. *De Meyer*, 2 Paige, 574; *Humber* v. *Trinity Church*, 7 *id.* 195; 24 Wend. 587; Story's Eq., § 529.)

I think this case comes within the principle established by the above authorities, and that, independently of the statutory provision limiting the time of commencing actions in courts of equity, it should be held that the six years' limitation to actions at law constitutes a defence to this action. The provision of the Revised Statutes limiting the time of commencing actions in courts of equity was adopted as declaratory of the law as it then existed, and not as introducing a new rule. (3 R. S. 705, revisers' notes.)

It would be an anomaly if the plaintiff could recover his debt by an action to enforce the lien given to secure the debt, when no action could be sustained to recover the debt directly without reference to the lien. There is no reason why the limitation should be applicable in the one case and not in the other.

It has, however, been held that where a mortgage was given to secure the payment of a simple contract debt, the statute limiting the time for commencing actions for the recovery of such debts was no bar to an action to foreclose the mortgage. (*Balch* v. *Onion*, 4 Cush. 559; *Thayer* v. *Mann*, 19 Pick. 535; *Elkin* v. *Edwards*, 8 Geo. 325; *Heyer* v. *Pruyn*, 7 Paige, 465.)

But there is a material distinction between a mortgage and the equitable lien for the purchase price of land given by law, and also between an action to foreclose a mortgage and one to enforce such a lien. The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and by reason of the seal the debt is not presumed to have been paid until the expiration of twenty years after it becomes due and payable. The six years' limitation has no application to a mortgage. In fact, all instruments under seal are expressly excepted therefrom. No action at law can be predicated upon the mortgage, to collect the debt secured thereby, unless there is contained therein a covenant to pay the debt. A debt secured by deed is said to be of a higher nature than one by simple contract. On the contrary, the equitable lien

is neither created or evidenced by deed, but arises by operation of law, and is of no higher nature than the debt which it secures. It must coexist with the debt and cannot survive it.

It is true, as claimed by the plaintiff's counsel, that the statute of limitations does not extinguish the debt; it only bars the remedy. But the remedy by action at law is no less barred than that by suit in equity to enforce the lien. The *Mayor, &c., of New York* v. *Colgate*, 2 Kern. 140, is relied upon by the plaintiff as an authority sustaining his position. That was an action for the collection of an assessment to defray the expenses of improving a street in the city of New York, under and by virtue of a lien upon certain lands in the city deemed to be benefited by the improvement, and upon which the assessment was made. The action was not commenced until more than six years after the assessment was made, and had become due and payable, and the six years' limitation was set up as a defence to the action.

The statute authorizing the assessment, and prescribing the remedies for its collection, provided that the sums thus assessed should be a lien or charge upon the houses and lots in respect to which the assessment was made, and might be sued for and recovered with costs, in like manner as if such houses and lots were mortgaged to the corporation for the payment thereof. The assessment was thus made, in effect, a mortgage with all its incidents, one of which was that payment was not to be presumed until the expiration of twenty years; and it was upon that ground that Judge Denio held that the six years' limitation did not apply, while Chief Judge Gardiner based his opinion on the ground that the assessment was in the nature of a judgment. In either view, the case is distinguishable from the one under consideration.

I think the judgment should be affirmed.

Denio, C. J., delivered an opinion for affirmance upon substantially the same grounds as those stated by Bowen, J.

All the judges except Brown, J. (who did not vote), concurring in this opinion,[1]

Judgment affirmed.

[1] *Trotter* v. *Erwin*, 27 Miss. 772 (1854), *accord*. *Lingan* v. *Henderson*, 1 Bland. Ch. (Md.) 236 (1827), *contra*. And see *Hulbert* v. *Clark*, 128 N. Y. 295, 300, where it is said of *Borst* v. *Corey* that "the reasoning by which the result was reached in that case is not altogether satisfactory."

within its terms. Here payment may be pleaded, and so may the statute itself without reference to the fact of payment.

Our conclusion, therefore, upon the first question presented is, that where an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the statute, the mortgagee has no remedy upon the mortgage; that though distinct remedies may be pursued by him, the limitation prescribed is the same to both.

Judgment affirmed.[1]

HARRIS *v.* MILLS

Supreme Court of Illinois, 1862

(28 *Ill.* 44)

Walker, J. This bill was exhibited to foreclose a mortgage, given to secure a note alleged to have been lost. The mortgage bears date the 12th of May, 1837, and recites a note for seven hundred dollars. The note is alleged to have been given on the 9th of April, 1836, by Edwin Mills to appellant, due on the 9th day of September, 1838. The mortgage was not recorded until the 8th day of November, 1855, and appears never to have been acknowledged. It also appears that Edwin Mills, on the 13th day of January, 1839, executed a mortgage on the same land to secure two thousand dollars to Harlow Mills, for indebtedness due to him. This latter mortgage was acknowledged and recorded. Edwin Mills, on the 17th day of February, 1842, conveyed the mortgaged premises to Harlow Mills for the expressed consideration of two thousand dollars. This deed was recorded on the 4th of August, 1842, in the proper office.

The bill charges that this deed and mortgage, from Edwin to Harlow Mills, are without consideration, and are fraudulent and void. It is also charged that they were taken by Harlow with full notice of appellant's prior mortgage. The answer alleges that a consideration was given, and denies all notice of the prior mortgage. The answer also sets up, and relies upon, the lapse of more than sixteen years after the maturity of the note and before the exhibition of the bill, as a bar to a foreclosure. On the hearing, the court below dismissed the bill and rendered a decree against complainant for costs, to reverse which he prosecutes this appeal.

[1] But that the mortgagor is not entitled to affirmative relief, see *De Cazara* v. *Oreña*, 80 Cal. 132 (1889).

The principal question presented by this record is this: the statute of limitations having barred a recovery by suit on the note, does it form a bar to a foreclosure of the mortgage by bill in equity? Had this been an action on the note, over sixteen years having elapsed after the maturity of the note, the recovery would have been barred. If such an action had been instituted, and a recovery defeated, the judgment could have been interposed as a successful bar to a foreclosure. Or, had an ejectment been brought, and the bar of the statute allowed to defeat a recovery against Harlow Mills or those holding under him, the judgment might also have been relied upon to prevent a decree of foreclosure. Or, had a *scire facias* been sued, and had the statute of limitations been successfully interposed to defeat a recovery, the judgment might have been pleaded to avoid a foreclosure by bill. When the party has elected one of several remedies, and it results in a judgment against the mortgagee, that judgment becomes as complete a bar to a proceeding in a different form for a foreclosure as payment, release, or other discharge.

The question, however, still recurs, whether, after several remedies have been barred, but not established in a legal proceeding, the bar may be relied upon in other and different remedies? As a general rule, courts of equity follow the law in allowing the defense of the statute of limitations. A bar of the statute, at law, forms a bar in equity. (Story's Eq. Pl., § 500, § 751.) In equity, as at law, an acknowledgment that a debt is due, and a promise to pay it, will take it out of the operation of the statute. If the mortgagor is permitted to remain in possession twenty years after a breach of the condition, the right to file a bill to foreclose will be generally considered as barred and extinguished. Though in cases of this description, as the law is not positive, but is based upon presumption of payment, it is open to be rebutted by circumstances. (2 Story's Eq., § 1028, b.) This court has repeatedly held, in conformity to the general doctrine announced by the adjudged cases, that the debt is the principal thing and the mortgage is the incident. That the latter follows the consideration of the former. That an assignment of the note operates *ipso facto* to transfer the mortgage. That a payment, release or other discharge of a note satisfies and releases the mortgage. If we are to be controlled by analogy, no reason can be perceived why a bar to a recovery on the note should not produce the same effect on the mortgage.

In Great Britain it is usual to insert in the mortgage itself a covenant for the payment of the money. When such a covenant is

has no application to their security, and that according to the law laid down in *In re Burke*, 9 L. R. Ir. 24, they are entitled to the priority which properly belongs to priority of date.

The case of the appellants is that the deposit on which the respondents rely was accompanied or preceded by certain letters leading up to the actual deposit which were sufficient to create, and which did in fact create, a valid equitable charge on Colonel Stevenson's interest in the Portlemon estate; that these letters, therefore, or some or one of them ought to have been registered, and that for want of such registration the claim put forward on behalf of the respondents fails, and their alleged security must be held to be fraudulent and void against holders of a subsequent registered mortgage.

The whole question, therefore, depends on the meaning and effect of these letters. They were written by Colonel Stevenson to the local manager of the Provincial Bank at Londonderry, where Colonel Stevenson's account was kept.

The earliest in date is one of March 26th, 1895. The others are dated May 18, May 24, and June 7. When those letters were written the conveyance of the Portlemon estate to Colonel Stevenson was not in existence—the arrangement for the sale of the property to him was only in progress. The conveyance was not executed until July 11, 1895.

Throughout the letters, and more particularly in the letter of May 18, Colonel Stevenson is making out a case for indulgence and pleading for forbearance. Apparently the local manager had given him to understand that he himself was likely to get into trouble with the head office over the account, and on May 18 Colonel Stevenson writes: "All you require is a little patience, and my account will be put upon a satisfactory basis." That was the tone of the letters throughout. In addition, it is enough for me to remind your Lordships that at the outset of the correspondence on March 26, 1895, Colonel Stevenson writes: "When I receive the title-deeds of the Portlemon property from my solicitors I will have same at once lodged with you." That was a clear and definite statement on which the manager of the bank was apparently intended to rely. From that statement Colonel Stevenson never receded. He never qualified it. On the contrary, he repeated it more than once, and in one letter he refers to it as a thing which he had "undertaken."

My Lords, if these letters were serious letters meant to be taken seriously, I cannot doubt that they created a valid charge in

equity attaching to Colonel Stevenson's interest in the Portlemon estate the very moment the property was conveyed to him, and carrying over his interest by way of security to the bank.

I therefore move your Lordships that the appeal be allowed, and the judgment of Meredith, J., restored with costs both here and below.

Lord Davey. My Lords, it might appear to some people that the policy of the Irish Registration Act was to postpone an unregistered transfer of property to a registered one, whether the non-registration arose from negligence or inadvertence or from the fact of the transfer having been effected without any document being executed which was capable of being registered. I must express my personal regret that it was not so held, but it is too late now for your Lordships to interfere with what has become the settled law and is expressed in *In re Burke*, 9 L. R. Ir. 24.

I am of opinion that the letters, reading them together, constituted a contract to create an equitable mortgage on the Portlemon estate as soon as the conveyance to Colonel Stevenson was completed. On that event taking place, the contract became absolute and bound the property in his hands. The letters, therefore, constituted a transfer to the bank of the equitable interest in the property, and constituted a conveyance within the meaning of the Registration Act. It ought, therefore, to have been registered in order to secure the priority of the bank; and not having been registered, I think the appellants who claim under a subsequent instrument which was registered are entitled to claim priority over the bank in respect of their advance.

Order of the Court of Appeal reversed; judgment of Meredith, J., restored with costs here and below.

SPRING *v.* SHORT

Court of Appeals of New York, 1882

(90 *N. Y.* 538)

Appeal from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made the second Monday of June, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage executed by

groceries delivered to said Greig, and to one Studley, which was then and there received and had by said Greig." He also found that the plaintiff made the advances and received the assignment of the bond and mortgage in good faith and without notice of any claim thereto in behalf of any other person. And he found, as conclusions of law, from the above facts, that the bond and mortgage were a valid security in the hands of the plaintiff for $177.68 and interest; and that the plaintiff was entitled to judgment for that sum with costs. From the judgment entered at a special term, upon this report, the defendants appealed.

By the Court, E. DARVIN SMITH, J. The assignment by Greig to the plaintiff, of the bond and mortgage in controversy in this action, was a gross fraud. Whether or not the plaintiff can maintain his title to such bond and mortgage, acquired by such fraud, is the question arising on this appeal. At the time of the assignment, the bond and mortgage actually and equitably belonged to the defendant Mary E. Barron, but the assignment to her was not recorded. The statute (2 R. S. 40, § 1, *3d ed.*) declares "that every unrecorded conveyance shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, whose conveyance shall be first duly recorded." The plaintiff's assignment was first recorded, and section 69 of the statute declares that the term "*purchaser,*" as used in that statute, shall be construed to embrace "every assignee of a mortgage." The assignment from Greig to the plaintiff purports, upon its face, to have been made "as collateral security for $177.68." The referee finds, and the proof clearly justified the finding, that $100 in cash was advanced at the time of the assignment, in consideration thereof, and that the $77.68 was for a pre-existing debt of Greig and one Studley to the plaintiff. The referee also finds that the plaintiff made the advance and took the assignment in good faith and without notice of any other claim to the bond and mortgage; and this finding on this question of fact is fully warranted by the evidence. The plaintiff, therefore, has an assignment of this bond and mortgage in due form from the apparent owner, as appeared from the record, together with the possession of the bond and mortgage itself, and is a subsequent purchaser in good faith, for a valuable consideration, and his conveyance is first recorded. His title to the bond and mortgage is therefore perfect under the statute.

But the plaintiff is not a *bona fide* purchaser, except as to the

$100, advanced at the time of the assignment, So far as relates to the $77.68, that was a past consideration, and the equity of Mrs. Barron is superior to his. To constitute a *bona fide purchaser* within the meaning of the recording acts, the party receiving the subsequent conveyance must not only have received the same without notice of the prior unrecorded *deed*, but he must have received the same upon some *new consideration* advanced at the time, or must have relinquished some security for a pre-existing debt due him. (*Dickerson* v. *Tillinghast*, 4 Paige, 222. *Stuart* v. *Kissam*, 2 Barb. 493. *Wood* v. *Chapin*, 3 Kern. 509.)

And when a party has obtained the legal title, if he has paid out a part of the consideration or value of the property, he is entitled to be considered a *bona fide* purchaser *pro tanto*. (*Peabody* v. *Fenton*, 3 Barb. Ch. 498. *Stalker* v. *McDonald*, 6 Hill, 96.) The case last cited, it is true, was the case of a promissory note. But the analogy between the case of a person claiming the rights of a *bona fide* holder of negotiable paper and a person claiming to be a subsequent purchaser for a valuable consideration, under the recording acts, is quite perfect, and there is no reason why the rule of law should not apply to them alike.

So far as the plaintiff took this bond and mortgage as a security for the debt of Greig and Studley, he is in no worse condition than he was before, and his equity is not superior to that of Mrs. Barron. Her prior equitable title and rights should prevail, except so far as the protection of the statute in express terms extends to the plaintiff as "*a subsequent purchaser in good faith and for a valuable consideration;*" that is, so far as a new consideration was presently paid or advanced in consideration of the transfer of such bond and mortgage. The referee therefore erred, so far as he directs judgment for the plaintiff for all of the plaintiff's claim exceeding $100 and interest thereon; and the judgment is so far erroneous. I am by no means sure that the assignment of the mortgage to Mrs. Barron did not merge the equitable into the legal estate so that nothing of interest in the mortgage remained capable of assignment to the plaintiff. But as this point was not raised before the referee, or considered by him, or particularly discussed here, I do not think it proper for the court now to pass upon that question. I think there should be a new trial, and as neither party has entirely succeeded, neither party should have costs of the appeal.

New trial granted.[1]

[1] *Accord, Ten Eyck* v. *Witbeck*, 135 N. Y. 40, 47 (1892).

each a domestic corporation, separately answered, denying none of the allegations of the complaint, but setting up, the Corn Exchange Bank that on the 10th day of January, 1911, it recovered a judgment against said Monahan in an action in the Supreme Court for $8,157.36, which judgment was docketed in the office of the clerk of Kings county on January 11, 1911, and W. & J. Sloane that it also recovered a judgment against said Monahan on January 10, 1911, in an action in the Supreme Court for $17,733.74, which judgment was also docketed in said clerk's office January 11, 1911. No attack is made upon the *bona fides* of said mortgage, nor do defendants contend that it was given in fraud of creditors. Plaintiff's motion for judgment on the pleadings was granted, and the question here is solely one of priority of lien.

The mortgage in question became and was from the date of its delivery a perfectly valid lien and incumbrance upon the premises therein described, as between the parties thereto. Even if it was given to secure payment of an antecedent debt, the same rule applies as between the parties and against all others who had at the time no equitable interest in the property, or who did not acquire rights as subsequent purchasers or incumbrancers for value. (1 Jones Mort. [3d ed.], § 458; *Young* v. *Guy*, 23 Hun, 1; aff'd., 87 N. Y. 457; *Obermeyer & Liebmann* v. *Jung*, 51 App. Div. 247.) The fact that no bond was actually given at the date of the execution and delivery of the mortgage does not impair it, since there was other sufficient consideration therefor. (1 Jones Mort. [3d ed.], § 353; *Goodhue* v. *Berrien*, 2 Sandf. Ch. 630; *Baldwin* v. *Raplee*, 4 Ben. 433.) Its validity does not depend upon the form of the indebtedness, whether by note, bond or otherwise, but upon the existence of the debt which it was given to secure. (*Goodhue* v. *Berrien*, *supra; Burger* v. *Hughes*, 5 Hun, 180; aff'd., 63 N. Y. 629.) This case is distinguishable from *Bergen* v. *Urbahn* (83 N. Y. 49, 51), where a bond was in fact given, which was not produced upon the trial, nor was any explanation offered for the failure to produce the same. The mortgage itself contains an express covenant to pay the debt, and the fact that no date is specified when it shall become payable does not render it unenforcible. Either the right to enforce it accrues immediately (*Purdy* v. *Philips*, 11 N. Y. 406; *Eaton* v. *Truesdail*, 40 Mich. 1; *Rhoads* v. *Reed*, 89 Penn. St. 436), or it may be enforced after the lapse of a reasonable time and upon demand. The complaint alleges demand, and if the rule of reasonable time does apply, it is for defendant to show that a lapse of nearly two years after delivery, without payment of either

interest on the debt or taxes or assessments upon the property, is not such reasonable time.

We think, therefore, that without reformation the mortgage was a valid and enforcible legal obligation on plaintiff's land, and as against defendants, judgment creditors of Monahan, a lien prior to the lien of such judgments, even though the mortgage was not recorded until after the judgments were docketed. The cases relied upon by appellants (*Ogden* v. *Ogden*, 180 Ill. 543; *Whiting Paper Co.* v. *Busse*, 95 Ill. App. 288; *Bramhall* v. *Flood*, 41 Conn. 68; *Porter* v. *Smith*, 13 Vt. 492) are clearly distinguishable. In the *Ogden* case it appeared that no actual indebtedness existed at the time of the delivery of the mortgage, nor until the delivery of the note recited therein, which was some six years subsequent to the date of the execution of the mortgage, and in the meantime the right of subsequent incumbrancers had intervened. In the case of *Whiting Paper Co.*, (*supra*), the original security had been surrendered, the *bona fides* of the debt was questioned, and the rights of subsequent incumbrancers had also intervened. In *Porter* v. *Smith*, (*supra*), where plaintiff held two promissory notes of defendant and it was agreed that two new notes should be given, secured by a mortgage, and the mortgage was drawn correctly describing said notes, but, by mistake, the new notes were retained by the debtor and the old notes returned to the creditor, the mortgagee, all that was held was that the mortgagee could not proceed at law in ejectment as he might otherwise have done, but must proceed in equity to enforce his claim. In *Bramhall* v. *Flood* (*supra*), the decision rested upon the peculiar provisions of the Recording Act of that State, which would seem to put judgment creditors upon a similar footing with purchasers and incumbrancers for value. (See *Pettibone* v. *Griswold*, 4 Conn. 158.) Our statute only provides that every conveyance (and for the purposes of the Recording Act a mortgage is within the definition of a conveyance) not recorded as therein required "is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded." (Real Prop. Law [Consol. Laws, chap. 50; Laws of 1909, chap. 52], § 291.) A judgment creditor is not such a purchaser, and an unrecorded conveyance has a preference over a judgment unless there is a superior equity in favor of the holder of the latter. (*Thomas* v. *Kelsey*, 30 Barb. 268; *Flagler* v. *Malloy*, 9 N. Y. Supp. 573; *Obermeyer & Liebmann* v. *Jung*, *supra*; *Russell* v. *Wales*, 119

purchaser of the premises by absolute deed, or otherwise, the record of a prior mortgage is sufficient notice thereof to him, no matter how often assigned, or whether the assignment be recorded or not. The only alteration made by the Recording Act of 1830 is, that an assignment must now be recorded as against a subsequent *bona fide* purchaser of the mortgage assigned. A 'subsequent purchaser in good faith,' in the Recording Act, as to this case, means a purchaser of the mortgage assigned, not a purchaser of the premises. A subsequent purchaser of the premises is bound by a prior recorded mortgage, no matter who holds it." (*Campbell* v. *Vedder*, 1 Abb. Ct. of App. Dec. 295, 302; s. c., 3 Keyes, 174.)

It is obvious that these cases are analogous to the case before us. Mr. Moore was not a *bona fide* purchaser within the principle established by those authorities, because the record of the mortgage was notice to him that the mortgage was outstanding and unsatisfied, and it was no concern of his who happened to be the owner at the time. In dealing with the property on the assumption that Edward S. Curtis still owned the mortgage, he acted at his peril and assumed the risk that Curtis might have transferred the mortgage to someone else. He was put upon his inquiry, and it was not enough for him to examine the record and see that no assignment of the mortgage appeared thereon, but he should have required a satisfaction piece in due form or the delivery of the mortgage and note.

The case of *Bacon* v. *Van Schoonhoven* (87 N. Y. 446) is not in conflict with the cases cited above. In that case the mortgagee advanced money in reliance upon a satisfaction piece executed by the mortgagee in a former mortgage, which had been duly recorded and in fact had been assigned, but the assignment was not recorded. The court held that the satisfaction piece was a conveyance within the meaning of the Recording Act, and that whoever advanced money to be secured by a bond and mortgage upon the faith of such an instrument was a *bona fide* purchaser within the provisions of the act. This was the question before the court, and all that was decided that bears upon the subject now before us, although language somewhat broader in its application was used in the opinion. Although both *Purdy* v. *Huntington* and *Campbell* v. *Vedder* were cited by counsel upon the argument, neither is referred to in the opinion, and it is clear that the court did not intend to overrule them. If Edward S. Curtis had given a satisfaction piece of the mortgage standing on the record in his name, the case relied upon by the defendant would be applicable.

He did not do this, however, but accepted title with constructive notice of an uncanceled mortgage, recorded and outstanding, without making inquiry or requiring the production of the mortgage itself, or the note that it was given to secure. Under these circumstances, he cannot be held a *bona fide* purchaser as against the mortgage assigned to the plaintiff, because it is not necessary to record an assignment of a recorded mortgage as against a subsequent purchaser of the mortgaged premises, but only as against a subsequent purchaser of the mortgage itself. (*Purdy* v. *Huntington*, *supra; Campbell* v. *Vedder*, *supra; Miller* v. *Lindsey*, 19 Hun, 207.)

There was no merger because the ownership of the mortgage, with the debt secured thereby, and the title to the land, did not meet in the same person. When the fee came back to Edward S. Curtis he had no title to the mortgage, for he had assigned it some months before. There can be no merger, at law, without a union of titles in the same person; nor, in equity, unless, also, there is an intention on the part of those concerned in the transaction that it should operate as a merger. In this case both the union and intention were wanting. (*Purdy* v. *Huntington*, *supra; Smith* v. *Roberts*, 91 N. Y. 470; *Sheldon* v. *Edwards*, 35 N. Y. 279, 284; *Bascom* v. *Smith*, 34 N. Y. 320.)

The defendant offered to show an agreement between said Armstrong and Edward S. Curtis, bearing the same date as the mortgage, which recited the conveyance of the property by Curtis to Armstrong, and provided for its reconveyance by Armstrong to Curtis. It contained a stipulation that Armstrong "has no beneficial interest in the above-described property, but holds it subject to a trust." This agreement was immaterial, and was properly excluded on that account. The plaintiff knew nothing of it and was not a party to it. Armstrong's title came from Curtis, and the plaintiff could not be affected by a secret agreement between them that the former should hold the premises in trust for the latter, when, according to the record, he held it in fee at the time the mortgage was executed, and the mortgage contained the recital that it was given to secure the payment of a part of the purchase money. Moreover, the plaintiff has the interest of both the trustee and the *cestui que trust*, for the one executed while the other assigned the mortgage.

After examining all of the exceptions, we think the judgment was right and that it should be affirmed, with costs.

All concur.[1]

[1] *Purdy* v. *Huntington*, 42 N. Y. 344 (1870), *accord*.

There must be one set of indexes for mortgages or securities in the nature of mortgages, and another set for conveyances and other instruments not intended as such mortgages or securities. Each set must contain two lists in alphabetical order, one consisting of the names of the grantors or mortgagors, followed by the names of their grantees or mortgagees, and the other list consisting of the names of the grantees or mortgagees, followed by the names of their grantors or mortgagors, with proper blanks in each class of names, for subsequent entries, which entries must be made as instruments are delivered for record. . . .

UNITED STATES FIDELITY & GUARANTY CO. *v.* UNITED STATES & MEXICAN TRUST CO.

CIRCUIT COURT OF APPEALS OF THE UNITED STATES, EIGHTH CIRCUIT, 1916

(234 *Fed.* 238)

APPEAL from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Bill by the United States & Mexican Trust Company and others against the Kansas City, Mexico & Orient Railroad Company and others to foreclose a mortgage, in which the United States Fidelity & Guaranty Company intervenes. From a decree of foreclosure, allowing the claim of the intervener as a general demand, but denying it as an equitable preference over the holders of bonds secured by the mortgage, the intervener appeals.

Affirmed.

Before SANBORN and SMITH, Circuit Judges, and REED, District Judge.

SANBORN, Circuit Judge. This is an appeal by the United States Fidelity & Guaranty Company, surety on a supersedeas bond of the Kansas City, Mexico & Orient Railroad Company, from a decree of the District Court allowing its claim in proceedings to foreclose the prior mortgage on the property of the Railroad Company as a general demand, but denying it an equitable preference over the holders of the bonds secured by the mortgage. The mortgage securing the bonds covered the property, the after-acquired property, and the income of the Railroad Company. It was made and recorded about February 1, 1901. On December 6, 1912, in the suit to foreclose the mortgage, a prior receivership of the property of the

Railroad Company was extended over the foreclosure suit. A decree of foreclosure was rendered on February 2, 1914, in which the court adjudged that the mortgage was a first lien upon the property and income of the Railroad Company to secure the payment of bonds issued thereunder to the amount of $24,538,000, and that the property be sold, and it was subsequently sold under the decree for $6,001,000 in this foreclosure suit. The Fidelity Company intervened, and prayed that the court would order its claim to be paid out of the proceeds of the sale of the property in preference to the claims of the bondholders secured by the mortgage.

Its claim arose in this way: One Madison, on June 19, 1911, recovered a judgment in one of the district courts of Kansas against the Railway Company, on account of a personal injury caused by the negligence of servants of the company, for $9,000 and costs, from which the Railway Company appealed. At the request of the Railway Company the Fidelity Company made and filed a supersedeas bond to stay the collection of the judgment, the judgment was subsequently affirmed, and the Fidelity Company paid the penalty of the bond, $10,247.05.

The first reason presented to this court for the reversal of the decree below is that the court failed to investigate, fix, and enforce the liability of the stockholders of the Railway Company to pay for their stock and to apply the payments that should thus be collected to a liquidation of the mortgage bonds. But the Fidelity Company presents this ground for relief for the first time in this court without pleading it in its intervening petition, or introducing any evidence below to sustain it, and without giving the trustee of the bondholders any notice of such a claim, or any opportunity to challenge it, or to produce evidence to defeat it in the court below. It is clearly too late to urge this contention for the first time now, and the consideration or maintenance of it by this court under these circumstances would be unjust and inequitable.

The second argument is that the judgment in Madison's personal injury suit was rendered on June 19, 1911; that at that time and when the supersedeas bond was given the Railway Company was in default in the payment of its interest on its bonds, and was insolvent; that the Fidelity Company had no knowledge of these facts; that if it had known them it would not have signed the bond, but that the holders of the bonds and coupons neither foreclosed their mortgage nor gave any notice of the financial conditions of the Railway Company to the Fidelity Company before it made its

not without knowledge of that opinion, had expressly held, and rather sternly insisted upon, the established contrary rule in *Kneeland* v. *American Loan Co.*, 136 U. S. 89, 97, 10 Sup. Ct. 950, 953 (34 L. Ed. 379), and had said:

"The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when the court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

In this state of the decisions the receivers applied to Judge Jenkins in the Wisconsin district for authority to pay the claim against the sureties on the supersedeas bond out of the income of the property in their hands in preference to the claims of the mortgage bondholders. Judge Jenkins reviewed the decision of Judge Caldwell and that of the Supreme Court in *Kneeland* v. *Loan Co.*, 136 U. S. 97, 10 Sup. Ct. 950, 34 L. Ed. 379, held that the decision

of Judge Caldwell was "in direct antagonism to the rulings of the Supreme Court," that he could not follow it, and denied the petition of the receivers. *Farmers' Loan & Trust Co.* v. *Northern Pac. R. Co.* (C. C.), 68 Fed. 36, 39. Thereupon the sureties, Griggs and Foster, applied to the District Court of Washington in the same foreclosure suit, for preferential payment of the same claim, and Judge Hanford, although he was aware of Judge Jenkins' decision to the contrary (71 Fed. 246), referred to Judge Caldwell's opinion in 53 Fed. 182, 196, said:

"It is my opinion that Judge Caldwell's opinion in that case is sound, and that the principles therein enunciated must prevail as the law of this country, and I have no hesitation in following that case in this instance." *Farmers' Loan & Trust Co.* v. *Northern Pac. R. Co.* (C. C.), 71 Fed. 245, 246, 248.

On the authority of Judge Caldwell's decision he gave the claim of the sureties a preference in payment over the claims of the mortgage bondholders, notwithstanding the decisions of the Supreme Court. This decision of Judge Hanford is the only decision cited by counsel for the Fidelity Company which is in point upon the issue in the case in hand. It lacks the support of reason and of authority, and the argument in it is not persuasive.

There is no equity in the claim of this surety to be preferred in payment out of the mortgaged property to the holders of the bonds. The mortgage was made and recorded a decade before the surety signed its bond. That mortgage was made and recorded for the express purpose of giving to the bondholders secured thereby a first lien upon the mortgaged property and a preference in payment out of the income and out of the proceeds of the property mortgaged. Such a preference was secured by the express terms of the contract made between the mortgagor, the trustee and the bondholders. Probably some of the bonds had been repeatedly sold between the time when they were issued and the date when the supersedeas bond was given. The purchasers bought them in reliance upon the first lien upon the property of the railway company evidenced by the recorded mortgage. They had no notice or knowledge that the Fidelity Company was acquiring or seeking to acquire a lien superior to their own. The Fidelity Company gave them no notice of its attempt so to do, and no opportunity to protect or defend themselves against it until, if its preferential lien exists at all, it has become perfect. On the other hand, the Fidelity Company, before and at the time it assumed its liability, had full knowledge by the record of the mortgage, first, that the bond-

The assignees in insolvency of the Potter-Lovell Company have no interest in the case. They have no claim arising upon any of these notes, and no duty in respect to the settlement of the questions involved in this suit.

Decree for the plaintiffs.

AGUILAR *v.* AGUILAR

COURT OF THE VICE CHANCELLOR, 1820

(5 *Maddock's Ch.* 414)

THE Plaintiff, who was the Wife of the Defendant *Aguilar*, having Property to her separate use, joined her Husband in a Grant of an Annuity, and the Grant comprised as well the separate Property of the Wife, as Property given to the Wife for Life, not to her separate use, and to which therefore her Husband was entitled *jure mariti.*

The Wife joined with the Husband in granting other Securities, which were charged upon her separate property alone. The Husband afterwards took the benefit of an Insolvent Debtor's Act, and his Debts being considered of small amount, he subsequently granted two Annuities charged on the Wife's Life Interest, to which he was entitled *jure mariti.*

The VICE CHANCELLOR held, first, that the Wife, being a Surety only in the Grant of Annuity, which comprised her Husband's Property as well as her own, was entitled as between her and her Husband, and the Assignee under the Insolvent Debtor's Act, and subsequent Annuitants, to have the Husband's income first applied in satisfaction of the Annuity.[1]

THE OLIVIA A. CARRIGAN

U. S. DISTRICT COURT, S. D. NEW YORK, 1881

(7 *Fed.* 507)

IN Admiralty.

CHOATE, D. J. The brig Olivia A. Carrigan, belonging to Halifax, Nova Scotia, together with the freight moneys due on her voyage to this port, were attached in a suit in this court for

[1] Remainder of opinion omitted.

seamen's wages, brought by the libellants, McNamara and others. After the service of the monition by the marshal on the parties owing the freight moneys, the sheriff of the county of New York served on them a warrant of attachment against the same freight moneys in their hands, issued out of the supreme court of New York at the suit of the petitioner Bertaux against the owner of the vessel. The vessel was condemned and sold under the decree of this court, and another libel was filed for supplies and materials. In the seamen's suit a decree was entered condemning the vessel and her freight for payment of the seamen's wages, and a final decree directed the payment of the freight to the satisfaction of the claim of the seamen, and that any balance due to the seamen, not paid by application of the freight, be paid out of the proceeds of the vessel. Before the execution of this decree in respect to the freight moneys, and before the freight had been paid into court, the petitioner Bertaux applied to the court for a modification of the decree so that the wages should be paid out of the proceeds of the vessel, leaving the freight moneys to satisfy his judgment, if he should recover judgment in his suit in the state court. This motion was opposed by the petitioner Dimock, who had filed his petition claiming the remnants and proceeds of the vessel under a mortgage from one Doyle, who was claimed to be the owner of the brig at the date of his mortgage, and by Doyle, who claimed the surplus, if any, as owner at the time of the sale of the vessel. Bertaux's application was by motion, on an affidavit; and, without determining whether he obtained any lien on the freight moneys by his attachment subsequent to that of the marshal, it was held that the proper mode of presenting his claim, if any he had, was by petition, and not by motion, and it was ordered that he have leave to file a petition, and in the meanwhile it was directed that the freight moneys be paid into the registry, and the decree in favor of the seamen be satisfied out of the proceeds of the vessel and the freight, leaving the question of the proper marshalling of the assets as between the two funds to be determined when all the parties were properly before the court, and proof should have been taken under the several petitions filed or to be filed. Bertaux has now come in by petition, and by a supplemental petition it appears that he has recovered a judgment for $288.24. The amount of the freight moneys in the registry is $653; the proceeds of the vessel remaining in the registry, after satisfying the decree in favor of the seamen and all other decrees for maritime liens, is $597.18. The mortgage of the petitioner Dimock is dated

resorting to Johnson, on the latter's covenant of warranty, and leaving Johnson to have recourse over to the mortgage, proceeds directly against the mortgaged property, which is ultimately liable for the mortgage debt, and in obtaining satisfaction therefrom for the portion of the mortgage debt the sale of his land discharged, secures full indemnity for the surety, Johnson, thus avoiding circuity of action.

And this meets the suggestion, that, in relief of the appellant and other purchasers from Powell, the recourse of Kleinworth should have been against Johnson on his covenant of warranty. If that had been done, then Johnson himself would have been subrogated to the rights under the mortgage, so that, in the end, the result to appellant would have been the same—the subjecting of the mortgaged premises. There is, besides, reason to believe that suit upon the covenant of warranty would have been unavailing. Johnson has deceased, and the records of the probate court show his estate to be insolvent. To be sure, this showing is in respect of personalty only, and there is a possibility of the decedent having left lands which might respond upon the covenant of warranty; nothing appears as to this.

The circumstance of Powell having sold the mortgaged lands, and they now being in the hands of purchasers from him, should make no difference. Such purchasers occupy no better position than Powell himself. The mortgage was upon record, and they bought with notice that the lands were mortgaged; that they stood as security for the payment of this mortgage indebtedness, and as indemnity to the sureties against its payment, and that they were liable to be resorted to and sold for the purpose of such security and indemnity.

They are now proceeded against but for such purpose, and these purchasers have no equitable cause of complaint.

If it be regarded important that they should have had notice that Johnson and Abernathy were sureties only, we think they were chargeable with such notice.

The proceedings of the county court under whose order of sale the administrator's sale of these lands of Riley was made, were a link in the chain of title of the mortgaged lands, and purchasers from Powell must be held as having notice of them. These proceedings show that the sale was to be on a credit, and that the purchaser was to give a mortgage on the land purchased, and a note with personal security; they show the sale of the lands to Powell, and Powell alone gives the mortgage on the lands pur-

chased. These circumstances, we think, afford notice that Powell was the principal in the transaction, and Johnson and Abernathy but his sureties. The answer of Beaver, too, admits such suretyship.[1]

The decree will be affirmed.

GASKILL *v.* WALES

COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1883

(36 *N. J. Eq.* 527)

THE CHANCELLOR.

This is an appeal from a decree of the Burlington circuit court in a suit for foreclosure of a mortgage held by the respondents' testator, Dr. Edmond L. B. Wales, on land in that country. The mortgaged premises are a tract of twenty-two and seventy-one hundredths acres. They were owned on the 11th day of May, 1874, by Joseph Grubb, and were then subject to two mortgages thereon, given by him to Caleb Wilkins, one for $1,000 and interest, and the other for $200 and interest. On that day Grubb borrowed of Dr. Wales $2,000 on mortgage of the property, and it was agreed between them that the mortgage should be the first lien thereon. It was given accordingly. With part of the $2,000 the Wilkins mortgages were paid, and they were then, by direction of Dr. Wales's attorney, canceled of record. On the 1st of May, 1874, a few days before the Wales mortgage was given, Grubb began the building of a dwelling-house on part of the property. The firm of Laumaster & Wright and Samuel E. Hancock furnished materials for the home, and Nathan Gaskill did work thereon. They filed and prosecuted to judgment lien-claims under the mechanic's lien law, for money due them therefor, and under executions on those judgments the dwelling-house and the curtilage thereof were sold, December 11th, 1875, to Hancock and the firm of Laumaster & Wright. The respondents claim that they are in equity entitled to be subrogated to the rights which Wilkins had under his mortgages when they were paid off, to the extent to which the money lent by their testator was used in the payment of those mortgages, and that for that amount and interest they are entitled to priority over the purchasers of the property under the lien-claims. The principle of subrogation is one of equity merely,

[1] Portion of opinion dealing with foreign questions omitted.

rights of the parties were conclusively established by it. The judgment did not settle the liabilities of the defendants as between themselves. (*Wadsworth* v. *Lyon, supra.*) If it had, it would be fatal to the appellant's position, for the judgment decreed that the land should be sold first and the respondent answer only for any deficiency, thus making the land the primary source for the payment of the mortgage.

The facts appearing in the affidavits were sufficient to justify the trial court in appointing a receiver pending the appeal, which is expressly authorized by section 713 (sub-div. 3) of the Code of Civil Procedure. The ground rent and taxes were in arrears and the security doubtful. The pecuniary responsibility of the respondent was wholly immaterial, as the judgment was to be enforced not against him, but in his favor.

The order appealed from should be affirmed, with costs, and both questions certified answered in the affirmative.[1]

PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT and WERNER, JJ., concur.

HARBERT'S CASE

COURT OF EXCHEQUER, 1584

(3 *Coke's Rep.* 11b)

AND in this case divers points were resolved:

Secondly,[2] it was resolved, that in case of a common person, the heir of the conusor, or he against whom the judgment is given in debt, shall be only charged, and shall not have contribution against the ter-tenant in some cases, and in some cases he shall have contribution, and shall not be only charged. For if a man be seised of three acres of land, and acknowledges a recognizance, or a statute, &c., and enfeoffs A of one acre, B of another, and the third descends to his heir; in this case, if execution be sued only against the heir, he shall not have contribution, for he comes to the land without consideration, and the heir sits in the seat of his ancestor. *Et hæres est alter ipse, et filius est pars patris,* and as it is said, *mortuus est pater, et quasi non est mortuus, quia reliquit similem sibi;* and therefore the heir shall not have contribution against any purchaser, although *in rei veritate* the purchaser came

[1] And see *Sternbach* v. *Friedman,* 34 App. Div. (N. Y.) 534 (1898).

[2] The opinion on this point only is given.

to the land without any valuable consideration, for the consideration of the purchase is not material in such case. And so it was of late resolved in the case of Thomas Gawdie, late Marshal of the King's Bench, that the heir may be solely charged, and shall not have contribution against purchasers.[1]

SANFORD *v.* HILL

Supreme Court of Errors of Connecticut, 1878

(46 *Conn.* 42)

Pardee, J. In 1870, Maria Bouton mortgaged a certain tract of land, with other lands, to the Norwalk Savings Society to secure the payment of $10,000; in 1871 she conveyed a portion of this tract, which we will designate as lot B, to E. J. Hill, by a deed warranting it to be free and clear from all incumbrances, which deed was immediately recorded in the town records. When he received it he made a parol agreement with the grantor that he would pay $300 upon the mortgage indebtedness to the savings bank as part consideration for his purchase. In 1873 he conveyed his interest in the lot to Hubbell & Tolles, by a quit-claim deed, in which there was no mention of any mortgage upon it, which deed was duly recorded. They entered into a parol agreement with Hill to pay the $300 to the bank; neither Hill nor Hubbell & Tolles have ever paid this money, and the last two were adjudged bankrupts in 1875, and John H. Smith was appointed their assignee.

In 1873, Maria Bouton conveyed a portion of the tract originally mortgaged to the bank, which we will designate as lot C, to Delia A. Sanford, the petitioner, by a quit-claim deed.

Maria Bouton, by giving a deed of warranty of B to E. J. Hill,

[1] In *Lanoy* v. *Duke of Athol*, 2 Atk. 444, Lord Hardwicke said: "Suppose a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first; the court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons."

To similar effect, see Chancellor Kent in *Clowes* v. *Dickenson*, 5 Johns. Ch. 235 (1821), and Miller, J., in *National Savings Bank* v. *Creswell*, 100 U. S. 630 (1880).

that ordinarily the adequacy of the first fund might be tested by an actual sale, and the creditor who was compelled first to resort to that, might still be in a position to resort to the other, to supply any deficiency; and here *Buck* may not be left in such a position. I think that is good reason why such a decree as the one made in this case, should be made only upon clear proof of the entire inadequacy of the remaining security. But I am not prepared to say that courts should not act upon such proof, or that a party so situated has any absolute right to have the adequacy of his remaining security tested in all cases by an actual sale. It is obvious that such a test could not be had in a case like this, and consequently, if that rule were adopted, it would lead to the injustice of cutting off the last mortgagee entirely, though it might not be at all necessary for the protection of the second. Courts are constantly adjudicating upon the most important rights of parties upon the theory that human testimony can establish facts with sufficient certainty to justify such adjudication, and I think the question of the adequacy or inadequacy of a security should form no exception.

I think the judgment should be affirmed, with costs, against the appellant, in favor of the plaintiffs and of *Mowry*.

Judgment affirmed accordingly.

LIBBY *v.* TUFTS

Court of Appeals of New York, 1890

(121 *N. Y.* 172)

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 18, 1888, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought for the foreclosure of a mortgage.

The facts are sufficiently stated in the opinion.

O'Brien, J. The action was brought to foreclose a mortgage given to secure the payment of $125,000, bearing date January 29, 1883, and duly recorded the next day, upon ten several lots of land in the city of New York, upon which houses were being constructed at the time of the execution and delivery of the mortgage; the houses having been completed at the time of the commence-

ment of this action. Nine of the lots were released from the lien of the mortgage from time to time, as payments were made, and prior to the commencement of the suit. The complaint states that the sum of $3,603.22 was due and unpaid upon the mortgage, but the referee found that the amounts so due was $1,801.61.

Only one of the ten lots is sought to be sold under the prayer of the complaint and the terms of the decree entered in the action.

The mortgage in question was executed by Mary Duffy and her husband to the plaintiff, and its purpose was to secure the payment of the purchase-price of the lots, and also certain advances of money made, or to be made, from time to time to the mortgagor for the purpose of aiding in the construction of buildings upon the lots.

The controversy in the case arises out of the answer of the defendant Tufts, that after the execution of the mortgage, and on the 7th day of August, 1883, Mary Duffy, the mortgagor, conveyed the lot directed by the decree in this action to be sold to him; that his deed was duly recorded on the 8th day of August, 1883, and that then the mortgage in question was a lien upon his lot, and also upon another lot which the mortgagor afterwards, and on the 29th day of August, 1883, conveyed to one James Kane; that the plaintiff having full notice of the rights of the defendant Tufts, nevertheless, thereafter, and in the month of October, 1883, without defendant's knowledge or consent, released and discharged the lot conveyed to Kane from the lien of the mortgage, and that the premises so released were, in value, more than sufficient to pay any sum due for principal and interest on the mortgage.

The referee has found that the conveyances to Kane and Tufts, and the release of the mortgage upon his lot, were made and delivered at the respective dates set forth in the answer, and the defense interposed by Tufts would be good were it not for other facts and other transactions connected with the deed to Kane which will presently be noticed.

The general equitable rule that when a mortgage covers several parcels of land that are separately and at different dates sold by the mortgagor, they are each liable to sale in satisfaction of the mortgage, as against the purchasers from the mortgagor, in the inverse order of alienation, is not disputed. Where the holder of a mortgage, with notice of the conveyance of a separate parcel of the land to a purchaser from the mortgagor, releases a part of the land subject to be sold first for the satisfaction of the mortgage, that fact generally constitutes a defense to the earlier purchaser

BOOK IV

ENFORCEMENT OF THE MORTGAGE BY MORTGAGEE

(*a*) *Strict Foreclosure*

4 KENT, COM. 181. The equity of redemption which exists in the mortgagor, after default in payment, may be barred or *foreclosed*, if the mortgagor continues in default after due notice to redeem. The ancient practice was, by bill in chancery to procure a decree for a strict foreclosure of the right to redeem, by which means the lands became the absolute property of the mortgagee. This is the English practice to this day, though sometimes the mortgagee will pray for, and obtain, a decree for a sale of the mortgaged premises, under the direction of an officer of the court, and the proceeds of the sale will, in that case, be applied towards the discharge of encumbrances according to priority. *Mondey* v. *Mondey*, 1 *Ves. & Beame*, 223. The latter practice is evidently the most beneficial to the mortgagor, as well as the most reasonable and accurate disposition of the pledge.

CLARK *v.* REYBURN

SUPREME COURT OF UNITED STATES, 1808

(8 *Wall.* 318)

MR. JUSTICE SWAYNE stated the case, and delivered the opinion of the court.

This is an appeal in equity. Reyburn is the complainant. Florinda Clark and Few only were made defendants by the original bill. She answered. Few filed a plea and demurred. On the 5th of May, 1862, leave was given to the complainant to amend his bill, and leave was given to Mrs. Clark to withdraw her answer. It had been filed as her answer in a former case, and was refiled in this case. The court ordered it to be restored to the files from which it had been taken. The complainant thereupon filed an amended bill whereby Jeremiah Clark was brought into the case as a defendant.

The amended bill states the following case:

That on the 30th of April, 1859, Jeremiah Clark executed to the complainant his promissory note for $5,250, payable twelve months from date, with interest after maturity at the rate of twenty-five per cent. per annum. On the same day, Clark and wife executed to the complainant a mortgage upon the real estate therein described, conditioned to secure the payment of the note. The mortgage was acknowledged by the grantors, and duly recorded. Clark failed to pay the note at maturity. The complainant, on the 5th of October, 1861, filed his bill of foreclosure against the same parties who are defendants in this suit. Before the hearing, the bill was dismissed as to Mrs. Clark and Few. It was adjudged and decreed that there was due from Jeremiah Clark $8,565.77; that he should be forever barred and foreclosed of any interest in the mortgaged premises, and that they should be sold by the marshal, and the proceeds applied to the payment of the amount found due. On the 27th of December, 1861, the marshal sold the premises to the complainant for $7,000, and on the 23d of that month executed to him a deed for the property. That there was still due to the complainant upon the decree the sum of $1,884.25, for the payment of which, the interest of Florinda Clark in the mortgaged premises is chargeable. That the defendant, Few, under a deed from Clark and wife to him in trust, claims to have the interest of a trustee in the property, which interest accrued subject to his mortgage. The prayer of the bill is for a decree of foreclosure as to the interest of Florinda Clark and Few in the mortgaged premises, and for general relief.

Few filed an answer which sets forth, that about the 12th of January, 1860, Clark and wife executed to him, in trust, a deed for the same premises described in the mortgage; that the persons for whose benefit the deed was made were Florinda Clark, the wife of Jeremiah Clark, and their children, then born and thereafter to be born, and the lawful heirs of such children, with certain limitations as to the further disposition of the property as set forth in the deed, a copy of which it is stated is annexed to the answer of Mrs. Clark to the amended bill in this case. As to all the other matters set forth in the bill, he avers that he had no knowledge, and he disclaims all interest in the matter in controversy, except as such trustee. He prays that the court will adjudge fairly between the parties in interest, and that he may be dismissed with costs.

Clark and wife failed to answer. The trust deed referred to in

until 1821, when the statutes were revised, the rights of the parties are to be determined by the laws of Massachusetts, then existing. By the statute of 1785, ch. 22, 1 Mass. Laws, 251, all real estates pledged or mortgaged are declared redeemable, unless the mortgagee, or person claiming under him, hath by process of law, or by open and peaceable entry, made in the presence of two witnesses, taken actual possession thereof, and continued that possession peaceably three years. By the additional statute of 1798, ch. 77, 2 Mass. Laws, 853, it is provided, that where the mortgagee has lawfully entered, and obtained the actual possession of the mortgaged premises, for condition broken, the mortgagor shall have a right to redeem the same, within three years next after such possession obtained, and not afterwards. And a process is provided by a bill in equity, whereby upon payment or tender made, within the period limited, he is to be restored to the enjoyment of the premises.

It is contended, that by lawful entry under the last statute, must be understood one made peaceably, in the presence of two witnesses, or obtained by process of law, according to the provisions of the former statute. There does not seem to be any sufficient reason, why the term, "*lawful entry,*" should receive so narrow a construction. Any peaceable entry made by the mortgagee, upon a surrender to him of the premises, or otherwise, would be lawful.

These statutes have frequently been under consideration in the Supreme Court of Massachusetts. In *Earskine* v. *Townsend*, 2 Mass. R. 493, it was stated by the Court, that if the mortgagee shall lawfully enter and take possession, after condition broken, the three years will commence from the time of such entry. But if he have entered before, they do not commence, until he shall have given notice to the mortgagor, after condition broken, that he holds for that cause. What shall constitute a lawful entry is not defined, but a mode of foreclosure is expressly recognized, not pointed out by the first statute, namely, by notice to the mortgagor. *Newall et al.* v. *Wright*, 3 Mass. R. 138, has the same doctrine. PARSONS, C. J., there says "when the mortgagor enters after condition broken, the three years commence on that entry."

In *Taylor* v. *Weld et al.*, 5 Mass. R. 109, it was stated by SEDGWICK, J., who delivered the opinion of the Court, that an entry, after condition broken, shall be understood to be for that cause. In that case it was held by the Court, under the statute of 1789, ch. 77, that the three years begin to run, from the time the mort-

gagee shall have made lawful entry for condition broken; and that to effect a foreclosure, it was no longer necessary, as was required by the former statute, that he should enter by process of law, or make open and peaceable entry in the presence of two witnesses. In *Pomeroy* v. *Winship*, 12 Mass. 514, PARKER, C. J., says, "It has already been decided that, where the mortgagee shall enter after condition broken, it shall be presumed that he entered for that cause; and the time for foreclosure shall run from that entry." The generality, however, of this intimation has been modified by subsequent decisions.

In *Thayer et al.* v. *Smith*, 17 Mass. R. 429, the court held, that the entry must be open and peaceable and actual possession taken, that the mortgagor may know when the three years commence, beyond which his right to redeem will cease; and that nothing short of actual notice to the mortgagor will supply the want of a continued possession. The same doctrine was laid down in *Gibson* v. *Crehore*, 5 Pick. 146, and in *Hadley et ux.* v. *Houghton*, 7 Pick. 29.

We are warranted then in deducing from the law of Massachusetts, as settled by judicial construction, that to effect a foreclosure by proceedings *in pais*, the mortgagee is to make lawful entry for condition broken, of which the parties to be affected must have actual or implied notice; and that notice is to be implied from a subsequent continued possession.

The entry of the mortgagee proved in this case, was after condition broken. The defendant entered lawfully for that cause and for the purpose of foreclosure, as appears by the consent in writing of William Boyd, the mortgagor, who had continued in possession up to that period. From that time, Boyd considered the land the property of the defendant, and his right was frequently recognized by Coombs, who became second mortgagee jointly with Pike. The first mortgage was recorded; Coombs knew of its existence; and Boyd, who was left in possession, and who acknowledged under his hand the entry of the defendant for condition broken, was for many years his near neighbor. Coombs found that the defendant had taken possession, after the date of the second mortgage to him.

He now states, that he neither knew or suspected that he did so for the purpose of foreclosure. It is somewhat remarkable, that interested as he was in the property, such a suspicion should not have entered his mind, during the years that the mortgagee had the possession and control of the land by his agents. If he had given himself the trouble to inquire, he might have ascertained the

(c) *Foreclosure under Power of Sale*

VERY *v.* RUSSELL

SUPREME COURT OF NEW HAMPSHIRE, 1874

(65 *N. H.* 646)

TRESPASS *qu. cl.* The parties agreed upon the following facts for the opinion of the court:

October 29, 1863, the plaintiff, being the owner of the *locus in quo*, made a mortgage thereof to one Cole, in which her husband joined, to secure a note for $1,000. Immediately succeeding the condition in the mortgage was the following: "And it is agreed that on failure of performance of said condition, the said John Cole may advertise said mortgaged premises for sale, by publication of notice in some newspaper printed at Keene, in said county, three weeks successively before such sale, and may sell the same at public auction to the highest bidder; and his deed thereof, in pursuance of such sale, shall convey to the purchaser an indefeasible title to the same, discharged of all rights of redemption by the mortgagors or any person claiming under them. And the mortgagee shall apply the proceeds of said sale in payment of said mortgage debt, and pay over the balance, if any, to the mortgagors, after deducting the expense of notice and sale."

Payment not being made according to the condition of the mortgage, Cole caused the premises to be advertised and sold in accordance with the above stipulation in the mortgage. The sum for which the premises sold was less than the amount then due on the mortgage. One Shaw, the agent and attorney of Cole, bid off the premises at the auction, but he was, in fact, acting for Cole in the business. Afterwards, Cole, by quitclaim deed, conveyed the premises to Shaw, and Shaw thereupon, for a valuable consideration, conveyed them to the defendant. The defendant subsequently went upon the land and cut wood and timber, for which acts this suit is brought.

FOSTER, J. The defendant claims title to the premises and property, which are the subject of the alleged trespass, by virtue of a valid execution of the power of sale contained in the plaintiff's mortgage to Cole.

The validity of such powers is very generally, if not universally,

recognized and declared by the text writers on both sides of the Atlantic, who adduce abundant authorities in support of their propositions. The doctrine seems to rest upon a principle no less broad and fundamental than the right of parties to make for themselves such legal contracts as they choose. 1 Wash. R. P. 498, and cases cited.

In *Bell* v. *Twilight*, 22 N. H. 500, 515, PERLEY, J., says,—"It may admit of doubt whether such powers to sell, granted in mortgages, are valid under our statutes, which define and fix the right of redemption, and provide easy and prompt methods of foreclosure." But we are unable to see upon what ground, in the absence of legislative prohibition, the court can put a restriction upon the freedom of the citizen to contract for the sale of his land, upon terms and in a mode stipulated in a mortgage, any more than upon his liberty to contract for its sale in any other way, or by stipulations contained in any other instrument.

The validity of such a power has been very generally affirmed in the other states of the Union. It is recognized in every other New England state, although in no one of them is it declared by express statute. Rhode Island and Massachusetts make statutory recognition of it, the latter by prescribing regulations for the proceedings at such sale, and the former by declaring that at an auction sale under a power contained in the mortgage the mortgagee may himself be the purchaser. Maine, Vermont, Massachusetts, and Connecticut, like our own state, have each provided other statutory methods of foreclosure, thus in effect declaring that those other methods are not provided and intended as a repeal or abrogation of the common law in this respect. See *Kinsley* v. *Ames*, 2 Met. 29; *White* v. *Brown*, 2 Cush. 412; *Roarty* v. *Mitchell*, 7 Gray, 243; *Capron* v. *Attleborough Bank*, 11 Gray, 492; *Smith* v. *Provin*, 4 Allen, 518; *Montague* v. *Dawes*, 12 Allen, 397; *Wing* v. *Cooper*, 37 Vt. 183; *Walthall* v. *Rives*, 34 Ala. 91; *Simson* v. *Eckstein*, 22 Cal. 590; *Mitchell* v. *Bogan*, 11 Rich. 686; *Bradley* v. *Chester Valley R. R. Co.*, 36 Pa. St. 141; *Hyman* v. *Devereaux*, 63 N. C. 624; *Bloom* v. *Van Rensselaer*, 15 Ill. 503.

Doubtless the power ought not to be recognized in any case, unless it is conveyed by an express grant and in clear and explicit language; and its execution should be jealously watched and declared void for the slightest unfairness or excess, or for anything that prevents competition. But the legal power of the parties to make such a contract must, we think, be upheld; and when, in carrying it out, the above essential conditions are fairly fulfilled,

is reported to have said: "The result seems to be that a mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his mortgage debt. If he exercises it *bona fide* for that purpose, without corruption, or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud." In the present case the statement of claim alleged, in effect, that the sale was very disadvantageous, but it gave no hint to the defendants that they would be called upon at the trial to meet a charge of either corruption or collusion, or to meet the case that the price was so low as in itself to be evidence of fraud. Under these circumstances, their Lordships are unable to attach the same importance as was attached by the Court of Appeal to the circumstance that the defendants produced no evidence as to the value of the property, nor are they prepared to dissent from the finding on the facts by the learned judge at the trial. They will therefore humbly advise His Majesty that the judgment of the Court of Appeal should be reversed and the judgment of Morrison, J., restored. The respondents will bear the costs of this appeal and the costs incurred in the Court of Appeal and the Supreme Court.[1]

CLARK *v.* SIMMONS

Supreme Judicial Court of Massachusetts, 1890

(150 *Mass.* 357)

Bill in Equity, filed in the Superior Court, to redeem land in Hanson from several mortgages. Hearing before Hammond, J., who found the following facts:

Edwin J. Brewster, who then owned the land in question, successively gave four mortgages thereof to Martin Howland, the last of which was dated June 27, 1884, the first three, which were duly recorded before December 1, 1884, being for two hundred and fifty dollars each, and the fourth, which was not recorded until December 8, 1884, being for one hundred and fifty dollars. On

[1] A mortgagee foreclosing by advertisement is regarded in equity as in the nature of a trustee and is bound to conduct the proceedings in a fair and just manner and in good faith. *Soule* v. *Ludlow*, 3 Hun. (N. Y.), 503 (1875).

August 30, 1884, Brewster executed a fifth mortgage, which was duly recorded on December 1, 1884, for two hundred and fifty dollars to the plaintiff, who then knew that the land was mortgaged for the aggregate amount of the four prior mortgages, but covered as he supposed by one mortgage; and he did not become aware of the existence of the second and third mortgages until he recorded the fifth mortgage on December 1, 1884, and he did not know of the existence of the fourth mortgage until the land was subsequently sold under the first mortgage. Afterwards the defendant, who had been duly appointed assignee in insolvency of Brewster, took an assignment in his individual capacity of the first four mortgages from Howland, at a time when there was a breach of condition of the first mortgage. At that time the plaintiff asked the defendant to notify him when he should take action looking to a sale. The defendant duly advertised the land for sale on September 1, 1888, on the premises, under the first mortgage, in a newspaper which satisfied the terms of the mortgage. On that day the defendant was ill, and, no bidders being present, the sale was adjourned by order of the defendant, and the auctioneer orally proclaimed an adjournment to the same place on a future day named. The sale was afterwards adjourned several times, in the same manner and for the same reason, and finally until November 24, 1888, at nine o'clock in the forenoon.

On November 23, 1888, the defendant wrote a letter and mailed it to the plaintiff, stating that the premises would be sold on the next day, but without stating the hour or the place. This letter by the usual course of mail reached the plaintiff's post-office at seven o'clock in the evening on the same day, but the plaintiff did not get it until nine o'clock on the same evening. On the morning of November 24, the plaintiff made inquiries of the people near the premises, but could gain no information as to the time or place of the sale. The plaintiff did not take or see the newspaper in which the original advertisement appeared, and no copy of the advertisement was at any time sent to him, and he was ignorant of the proposed sale until he received the defendant's letter. There was no notice of the time and place of the adjourned sales, except the successive oral proclamations of the auctioneer, and no notice of any kind was ever posted upon the premises, and no one was present at any time except the auctioneer and the agent of the defendant. On that morning the auctioneer and the defendant's agent reached the mortgaged premises about twenty minutes before the time fixed for the sale, and at nine o'clock,

account for the fair value of the property and that the plaintiff was entitled to a decree for the difference between such value and the amount for which the property was bid off by the defendant, and that such difference would equal or exceed the balance due on the note. We assume that the contention of the plaintiff before this court is the same as that made by him in the Superior Court.

A final decree having been entered in the Superior Court dismissing the bill, from which the plaintiff has appealed, it becomes necessary to consider in detail the findings of fact made by the judge in his memorandum so far as they are said by the plantiff to have been plainly wrong.

The fourth assignment of errors raises the question whether there was a valid sale under the power in the mortgage. When the proceedings to foreclose the mortgage were instituted on April 23, 1913, it is plain that there existed a breach of the condition to pay the taxes. The undisputed evidence shows that the taxes assessed as of April 1, 1912, were past due and unpaid and that interest thereon had been accumulating since November 1, 1912, and the security of the mortgage was diminishing. If it be conceded that the defendant was bound to apply the rents received in payment of the taxes, it appears that the total amount of rents collected was much less than the amount of the tax. The contention of the plaintiff that the defendant was obliged to pay the tax before he had a right to foreclose the mortgage cannot be sustained. Under the circumstances disclosed by the evidence the defendant was entitled to proceed to foreclose his mortgage for breach because of the failure of the plaintiff to pay the tax assessed as of April 1, 1912. *Stevens* v. *Cohen*, 170 Mass. 551, 554. The defendant in executing the power was bound to exercise the utmost good faith for the protection of the rights of the owner of the equity of redemption as well as those of the plaintiff. *Boutelle* v. *Carpenter*, 182 Mass. 417. The mortgagee in the exercise of the power was bound not only to comply with its literal terms but was required to use reasonable diligence to protect the rights and interests of the owner of the equity of redemption and the plaintiff. *Bon* v. *Graves*, 216 Mass. 440, 446; *Briggs* v. *Briggs*, 135 Mass. 306, 309; *Dexter* v. *Shepard*, 117 Mass. 480. There was evidence to show that the notice of sale was published not only in the Boston Advertiser but also in the Banker and Tradesman, that notice was mailed to the plaintiff, and that the owner of the equity of redemption also had notice, that on May 15, the day fixed for the sale, it was adjourned for two weeks by direction of

the defendant at the request of Nickerson, the owner of the equity, for the purpose of giving him an opportunity to pay the taxes, that, the taxes not having been paid, the sale was made on May 29. While the defendant was the only bidder, that fact is not sufficient to set aside the sale, nor does the fact that the estate brought less than its value as found by the court render it invalid. *Learned* v. *Geer*, 139 Mass. 31; *Stevenson* v. *Hano*, 148 Mass. 616; *Fennyery* v. *Ransom*, 170 Mass. 303; *New England Mutual Life Ins. Co.* v. *Wing*, 191 Mass. 192; *Turansky* v. *Weinberg*, 211 Mass 324; *Vahey* v. *Bigelow*, 208 Mass. 89. The evidence shows that the defendant complied in all respects with the power. There was also evidence to show that he endeavored to induce others to attend the sale and bid upon the property. On the other hand, while there was evidence to show that the plaintiff had notice of the sale, he did not attend nor does it appear that he did anything to protect his rights by attempting to procure the attendance of others or otherwise. *King* v. *Bronson*, 122 Mass. 122. So long as the plaintiff relied upon the allegations that the sale was not conducted fairly and in good faith, the burden rested upon him to show it. *Wadsworth* v. *Glynn*, 131 Mass. 220; *Vahey* v. *Bigelow*, 208 Mass. 89, 93.

We are of opinion that the notice of sale was valid and that the finding of the judge of the Superior Court that the sale was conducted in good faith and fully conformed to the terms of the power cannot be held to have been plainly wrong. It cannot be ruled as matter of law that notice of the adjournment should have been published in a newspaper or that the proclamation made by the auctioneer on May 15 was not sufficient. As was said in *Dexter* v. *Shepard*, 117 Mass. 480, at page 485, "A sale regularly adjourned is, when made, in effect the sale of which previous notice had been given." The sale was made only fourteen days after the time named in the original notice and there was evidence that the plaintiff had or might have had notice of the adjournment by the exercise of reasonable diligence for the protection of his interests. The facts in *Clark* v. *Simmons*, 150 Mass. 357, plainly distinguish that case from the case at bar. Upon this question of adjournment the memorandum of the judge contains the following: "I am unable to find that a further adjournment, even though accompanied by a new advertisement, would have resulted in the attendance at the sale of persons who would have paid a greater sum. Such a favorable result is pure speculation." See *Austin* v. *Hatch*, 159 Mass. 198.

Decree affirmed with costs.

the moneys hereby secured which remain unpaid, shall, at the election of the party of the second part, his successor, successors and assigns, become forthwith due and payable; and in case of the non-payment of said notes, drafts and other commercial paper, as above provided, or any part thereof, at the times limited for the payment thereof, it shall and may be lawful for the said party of the second part, his successor, successors and assigns, and the said party of the first part does hereby empower and authorize the said party of the second part, his successor, successors and assigns to sell the said premises, with the appurtenances or any part or parts thereof, in the manner prescribed by law, and out of the moneys arising from such sale or sales to retain all the principal money and interest remaining unpaid on said notes, drafts and other commercial paper, and the costs, charges and expense of making such sale."

Upon the trial the plaintiffs produced in evidence the affidavits, etc., in the foreclosure proceedings. The affidavit of service of notice of foreclosure was made by the attorney, who stated, in substance, that service was made upon defendant by mailing notice at Greenwich, addressed to him as follows: "Jesse K. Sanborn, Sandy Hill, Washington county, N. Y." The affidavit, after stating service of notice by mail upon other persons, contained this clause: "At that time each of said persons resided, as this deponent is informed and believes, at the respective places to which their said notices were so addressed."

Plaintiff proved by parol evidence that defendant did reside at Sandy Hill at the time of service of notice, and the court so found.

Defendant's counsel moved for a nonsuit and for judgment on the grounds, among others: 4. That there is no sufficient proof of service on the mortgagor. 6. That the foreclosure not being in conformity to the statute, was void, which motion was denied. The court held that plaintiff did not have title.

ANDREWS, J.[1] The principal question in the case is the one already suggested, viz., was evidence admissible to prove that the mortgagor resided at Sandy Hill when the notice was mailed? or, the question involved is still more comprehensive, viz., when title is claimed under the foreclosure of a mortgage, by advertisement, may the fact of the service of notice of sale, upon the mortgagor or other persons affected by the proceedings, be shown in support of the title, by any competent common-law evidence, in

[1] Portions of opinion omitted.

the absence of an affidavit showing such service? The right of a mortgagee to extinguish the equity of redemption by a sale of the land without judicial proceedings or the decree of the court, depends upon the existence of a power of sale in the mortgage or other instrument executed by the mortgagor. If a power of sale is not given, the mortgagee must resort to a court of equity to enforce the mortgage. This principle of the common law has been retained in the statute for the foreclosure of mortgages, by advertisement, which only authorizes this proceeding in cases where the mortgage contains a power of sale. (2 R. S., 545, § 1.)

In the absence of a statute regulating the mode of executing the power the mortgagee may sell the land at public or private sale, unless the particular manner of sale is prescribed by the instrument creating the power (*Davey* v. *Durant*, 1 De Gex and J., 535; 2 Wash. on Real Prop., 77), in which case the mortgagee must, in executing the power, conform to the conditions imposed. The mortgagee could not at common law become the purchaser on a sale made by himself under the power, or at least such a sale was voidable at the election of the mortgagor. He could not at the same time be a trustee of the power of sale, and a purchaser under it. (1 Sug. on Vend. 94; 3 *id.* 229; Wash. on Real Prop. 77.) And, where a sale was made under the power a deed from the mortgagee to the purchaser was necessary to pass the title. (*Arnot* v. *McClure*, 4 Den. 44.)

The mortgagee under the law of England has the legal title to the mortgaged premises, and under our law it remains in the mortgagor until foreclosure, but in either case a deed is necessary to satisfy the statute of frauds, and to vest the title in the purchaser, unless the legislature has interfered and created an exception, or has substituted some other evidence of title in place of a common-law conveyance.

When a power of sale is given to be executed under certain conditions, or its execution is made by the terms of the power to depend upon the performance of precedent acts, and the validity of a conveyance made in assumed execution of the power is in question, oral evidence of a compliance with the conditions, is admissible, unless such proof is excluded by the nature of the conditions imposed, or the terms of the power. In *Hawley* v. *Bennett*, (5 Paige, 104), entries in the register of an attorney, who conducted a foreclosure by advertisement, were admitted after his death in support of the title under a deed given on the foreclosure, to show a compliance with the statute, and the circumstances of the sale.

person, to sell the mortgaged property, upon default being made in a condition of the mortgage, may be foreclosed, in the manner prescribed in this title, where the following requisites concur:

1. Default has been made in a condition of the mortgage, whereby the power to sell has become operative.

2. An action has not been brought to recover the debt secured by the mortgage, or any part thereof; or, if such an action has been brought, it has been discontinued, or final judgment has been rendered therein against the plaintiff, or an execution, issued upon a judgment rendered therein in favor of the plaintiff has been returned wholly or partly unsatisfied.

3. The mortgage has been recorded in the proper book for recording mortgages, in the county wherein the property is situated.

§ 2388. *Notice of sale; how given.* The person entitled to execute the power of sale, must give notice, in the following manner, that the mortgage will be foreclosed, by a sale of the mortgaged property, or a part thereof, at a time and place specified in the notice:

1. A copy of the notice must be published, at least once in each of the twelve weeks, immediately preceding the day of sale, in a newspaper published in the county or in a municipal corporation a part of which is within the county in which the property to be sold, or a part thereof, is situated.

2. A copy of the notice must be fastened up, at least eighty-four days before the day of sale, in a conspicuous place, at or near the entrance of the building, where the county court of each county, wherein the property to be sold is situated, is directed to be held; or, if there are two or more such buildings in the same county, then in a like place, at or near the entrance of the building nearest to the property; or, in the city and county of New York, in a like place, at or near the entrance of the building where the trial and special terms of the supreme court of the first judicial district are directed by law to be held.

3. A copy of the notice must be delivered, at least eighty-four days before the day of sale, to the clerk of each county, wherein the mortgaged property, or any part thereof, is situated.

4. A copy of the notice must be served, as prescribed in the next section, upon the mortgagor, or, if he is dead, upon his executor or administrator, if an executor or administrator has been appointed, and also upon his heirs, providing he died the owner of the mortgaged premises. A copy of the notice may also be served, in a

like manner, upon a subsequent grantee or mortgagee of the property, whose conveyance was recorded, in the proper office for recording it in the county, at the time of the first publication of the notice of sale; upon the wife or widow of the mortgagor, and the wife or widow of each subsequent grantee whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgagee; or in the event of the death of the subsequent grantee who was at the time of his death the owner of the mortgaged premises, then upon his heirs; or upon any person, then having a lien upon the property, subsequent to the mortgage by virtue of a judgment or decree duly docketed in the county clerk's office and constituting a specific or general lien upon the property. The notice, specified in this section, must be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case it may be subscribed by his attorney or agent.

§ 2391. *Contents of notice of sale.* The notice of sale must specify:

1. The names of the mortgagor, of the mortgagee and of each assignee of the mortgage.

2. The date of the mortgage, and the time when, and the place where, it is recorded.

3. The sum claimed to be due upon the mortgage, at the time of the first publication of the notice; and, if any sum secured by the mortgage is not then due, the amount to become due thereupon.

4. A description of the mortgaged property, conforming substantially to that contained in the mortgage.

§ 2392. *Sale; how postponed.* The sale may be postponed, from time to time. In that case, a notice of the postponement must be published, as soon as practicable thereafter, in the newspaper in which the original notice was published; and the publication of the original notice, and of each notice of postponement, must be continued, at least once in each week, until the time to which the sale is finally postponed.

§ 2393. *Id.; how conducted.* The sale must be at public auction, in the daytime, on a day other than Sunday or a public holiday, in the county in which the mortgaged property, or a part thereof, is situated; except that, where the mortgage is to the people of the State, the sale may be made at the Capitol. If the property consists of two or more distinct farms, tracts, or lots, they must be sold separately; and as many only of the distinct farms, tracts, or

a man who was insisting on having a conveyance under that power. The foreclosure *nisi*, in my opinion, does not destroy the power; the remedies of the mortgagee are merely suspended for the purpose of carrying out that particular relief which he has sought, and would remain available for him, if, for example both parties were to agree that all the proceedings should be stayed, or the Court should order, as it did in the *Exchange and Hop War houses Case*, 34 Ch. D. 195, the taking of the account to be stayed. In that case the direction to reconvey still remained. It appears to me it would be impossible to hold that the power of sale was gone by reason of that direction to reconvey, although the Court had said it was idle to go on with the accounts because the balance was so enormously against the mortgagor that it was useless.

This is a question of some importance to purchasers, because, assuming there is no lis pendens registered, a purchaser buying in good faith from a mortgagee under a power of sale would find he had no title at all if the power was absolutely extinguished. I do not know of any case in which a power has ever been held to be extinguished by reason of any of the usual decrees of the Court, such as the decree for administration. Even a decree for dissolution of marriage by the Court does not of itself extinguish the settlement which was made upon the marriage, or any powers contained therein. A decree for the administration of the trusts of a will or for the execution of the trusts of a settlement does not extinguish the power: it merely requires the person exercising it to come for the leave of the Court before he does it. In my opinion, if the mortgagee had in this case come to the Court he might have got leave to exercise the power. I see nothing in the fact that s. 25, sub-s. 2, of the Conveyancing Act gives the Court a power of sale inconsistent with leaving in existence the power given by the deed or by s. 19 of the Act. The power of sale in s. 19 is given only to mortgagees who have a mortgage by deed, whereas the power of sale by the Court and the power to ask the Court to direct a sale under s. 25 extends to equitable mortgages as well. There is nothing in the least inconsistent to my mind between the two sections.

The result is, in my judgment, that the mortgagee could not exercise the power of sale without the leave of the Court, but that the power of sale was not extinguished, so that the question whether a purchaser from a mortgagee got a good title or not will depend on whether she is affected with notice or whether she got the legal estate without notice.

The declaration finally settled was:—

"That the mortgagee could not exercise his power of sale without the leave of the Court so as to give a good title to any one other than a purchaser for value without notice. But this is not to preclude the mortgagee from setting up any other equity he may have in any action brought by the mortgagor."

MOULTON *v.* CORNISH

Court of Appeals of New York, 1893

(138 *N. Y.* 133)

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 17, 1891, which modified and affirmed, as modified, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action for the foreclosure of a mortgage.

Maynard, J.[1] In 1886 the plaintiff was the owner of a mortgage, given to secure the payment of eighty-six hundred and fifty dollars and interest, upon three several lots of land in the town of Floyd, Oneida county, known as the Klock, Eells and Tavern farms, and the defendant was the owner of a subsequent mortgage upon the same property given to secure the payment of $2,500 and interest, which, with the assignments to him, were recorded in the Oneida county clerk's office.

On May 16th, the plaintiff commenced an action in the Supreme Court for the foreclosure of her mortgage, but omitted to make the defendant a party thereto. This omission was not intentional, but the plaintiff was misled by an abstract of a search obtained from the clerk's office, from which it might have been fairly inferred that the defendant's assignment was one in a series of transfers, and that the title to his mortgage was in another, who was made a defendant, and who appeared from the abstract to be a subsequent assignee. If a full statement of the search in the usual form had been obtained by the plaintiff, the interest of the defendant in the mortgaged property would have correctly appeared. The action resulted in a judgment entered December 27, 1888, decreeing a foreclosure of

[1] Portions of opinion omitted.

only be secured to him by a sale, in an action or proceeding to which he is a party; for in all such cases the sale is made for the benefit of all the parties interested, and the proceeds are distributed among them, in the order of the priority of their respective liens.

As to this defendant, the plaintiff is only a mortgagee in possession. It is true she has also acquired the title of the mortgagor and has extinguished the liens of all other incumbrancers, who were made parties to the foreclosure action.

But she occupies no better position with respect to the defendant than if she had taken a deed from the mortgagor and an assignment of the other incumbrances and had gone into possession. As to the defendant, her mortgage is still unforeclosed, and the estate, which the mortgagor had when he executed the defendant's mortgage, is still subject to its lien. The plaintiff may at any time foreclose her mortgage, as against the defendant, notwithstanding the former defective foreclosure. (*Brainard* v. *Cooper*, 10 N. Y. 356; *Walsh* v. *Rutgers Fire Ins. Co.*, 13 Abb. Pr. 33; *Franklyn* v. *Howard*, 61 How. Pr. 43.) It imposes no hardship to require her to pursue such course if she wishes to rid the title of the lien of defendant's mortgage. She will be as fully protected upon such a foreclosure as she would have been upon the original foreclosure had she made him a party to it.

The plaintiff may have the ordinary decree of foreclosure against the defendant in this action if she so desires, and all persons who are necessary parties defendant are brought in. It is not seen how any relief can be afforded without the presence of the purchasers of the other two parcels of the mortgaged premises. If it is sought to re-foreclose plaintiff's mortgage, they are unquestionably necessary parties, as the owners of separate portions of the property mortgaged, and by their purchases they have respectively acquired an interest in plaintiff's mortgage. If the court is asked to apportion either the plaintiff's or the defendant's mortgage between the three farms, they are necessary parties to a determination of that question. They would not be bound by any judgment rendered in this action which adjudged the extent of the lien of either mortgage upon their respective properties, and such adjudication would be necessarily involved in the ascertainment of the amount of either mortgage equitably chargeable upon the several parcels. In such a case the objection of a defect of parties is available, although not raised by demurrer of answer. The plaintiff is not entitled to the equitable relief sought, if it

have dealt with it correctly. I am therefore inclined to think that neither party ought to recover costs as against the other.

The cause should be remitted to the court below to carry out the decree as modified.

Cooley and Campbell, JJ., concurred.[1]

Christiancy, Ch. J. I concur in the result, upon the ground that the title could not be litigated under this bill. I express no opinion whether it could properly have been contested under pleadings which should distinctly put the question of title in issue.

NUTT *v.* CUMING

Court of Appeals of New York, 1898

(155 *N. Y.* 309)

Haight, J. On the 9th day of August, 1882, the defendant Cuming recovered a judgment against one Thomas Kerrigan, which became a lien upon real estate subject to the lien of a mortgage theretofore executed, bearing date the 14th day of January, 1882. On the 1st day of October, 1891, an action was brought to foreclose the mortgage, which resulted in the entering of the usual judgment of foreclosure and sale on the 13th day of January, 1892. The sale of the property under the judgment did not, however, take place until December, 1896, and after the expiration of ten years from the entry of the Cuming judgment. The special Term held that Cuming was entitled to have his judgment paid out of the surplus moneys arising on the sale. The Appellate Division reversed this part of the order, holding that the lien of the judgment had ceased to exist before the sale took place under the foreclosure judgment, and that, therefore, no lien in favor of Cuming was transferred to the surplus moneys.

It is now claimed that the foreclosure judgment having been entered before the expiration of the ten years from the entry of the Cuming's judgment the lien was, by operation of law, transferred to the surplus moneys that should arise upon the sale of the premises as of the day of the entry of the foreclosure judgment, and that from that time he was barred and foreclosed of all right, title, interest or equity of redemption in the mortgaged premises. We do not so understand the law. The judgment of foreclosure first determined the amount due upon the mortgage. It then

[1] *Accord, McCamman* v. *Davis*, 162 Mich. 435, 438 (1910).

as sanctioning a dismissal of the plaintiff's complaint on this ground. That case must be confined to its precise facts where the court held that the plaintiff's course of dealing with the defendant misled the defendant. Without such a finding that decision would be in flat opposition with a long line of authorities which settled the law on this point for several generations. (*Smith* v. *Lamb*, 59 Misc. Rep. 568.)

I find no satisfactory evidence in this case that the plaintiff in any way misled the defendants. Judgment is directed for the plaintiff against all the defendants for a foreclosure of the mortgage in suit. Provision is to be made in the findings and judgment defining the contingent liability of these two defendants as guarantors to the amount stated in their written guaranty.

NEW YORK CODE CIV. PROC., § 1626. *Final judgment; what to contain.* In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged, or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action.

§ 1627. *Person liable for mortgage debt may be made defendant, etc.* 1. Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action and if he has appeared or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein. . . .

§ 1631. *Notice of pendency of action to be filed.* The plaintiff must, at least twenty days before a final judgment directing a sale is rendered, file, in the clerk's office of each county where the mortgaged property is situated, a notice of the pendency of the action, as prescribed in section 1670 of this act; which must specify in addition to particulars required by that section, the date of the mortgage, the parties thereto, and the time and place of recording it.

§ 1632. *Effect of conveyance upon sale.* A conveyance upon a sale, made pursuant to a final judgment, in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate, only, that would have vested in the mortgagee, if the equity of redemption had been foreclosed. Such a conveyance is

as valid, as if it was executed by the mortgagor and mortgagee, and is an entire bar against each of them, and against every person claiming from, through or under a party, by title accruing after the filing of the notice of the pendency of the action, as prescribed in the last section.

§ 1636. *When part only of the property to be sold.* Where the mortgage debt is not all due, and the mortgaged property is so circumstanced, that it can be sold in parcels without injury to the interests of the parties, the final judgment must direct, that no more of the property be sold, in the first place, than is sufficient to satisfy the sum then due, with the costs of the action and expenses of the sale; and that upon a subsequent default in the payment of principal or interest, the plaintiff may apply for an order, directing the sale of the residue, or of so much thereof as is necessary to satisfy the amount then due, with the costs of the application and the expenses of the sale. The plaintiff may apply for and obtain such an order, as often as a default happens.

§ 1637. *When the whole property may be sold.* If, in a case specified in the last three sections, it appears that the mortgaged property is so circumstanced, that a sale of the whole will be most beneficial to the parties, the final judgment must direct, that the whole property be sold; that the proceeds of the sale, after deducting the costs of the action and the expenses of the sale, be either applied to the satisfaction of the whole sum secured by the mortgage, with such a rebate of interest, as justice requires; or be first applied to the payment of the sum due, and the balance, or so much thereof as is necessary, be invested at interest, for the benefit of the plaintiff, to be paid to him from time to time, as any part of the principal or interest becomes due.